20443

VOL 195

130 - 20443.

L. GOLDSTEIN,
Defendant in Error,

vs.

LOUIS DASCH & Co.,
a corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 1

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Goldstein, plaintiff below, bought of the defendant corporation, which conducted a jewelry store, a pair of diamond ear-rings for $200, one-half of which he paid in cash and the other half in a pair of ear-rings taken at the valuation of $100. He claimed that the purchase was upon the express condition that he might return the goods any time within one year and receive the purchase price less 10%, and that, within a few weeks and several times within the year, he went to defendant's store and said he wanted to give back the ear-rings and demanded the return of his money less 10%, and that defendant refused to give it to him.

The case was tried before the court without a jury which rendered judgment for plaintiff for $180. No proposition of law was submitted to be held as such and none is otherwise raised in the record, except as to the sufficiency of the evidence to support the judgment. We regard it as sufficient, and, as its weight depends largely on the credibility of the witnesses, which the court had a better opportunity than we have to determine, we are not disposed to disturb the court's finding. We need not, therefore, review the evidence in detail.

It is urged that plaintiff did not tender the purchased goods to defendant. While we think the evidence tends to show the contrary, yet a formal tender became unnecessary when defendant refused to carry out the agreement.

It is also urged that an order entered, impounding the ear-rings with the clerk of the court, was erroneous in that it failed to order them delivered to defendant on its satisfying the judgment. If such order is before us for review, it is enough to say that such a provision is not essential to the power of the court to release the goods held in its own custody, and to deliver them to defendant, on affirmance of its judgment.

AFFIRMED.

186 - 20503.

MARGARET CANEY,
Defendant in Error,

vs.

LADIES CATHOLIC BENEVOLENT ASSOCIATION,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT,
OF CHICAGO.

195 I.A. 2

MR. JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This action was brought by Margaret Caney against the Ladies Catholic Benevolent Association to recover $500 and interest on a benefit certificate for $1000 issued to Anna Mahon, a member of the association, providing for payment, on the death of said Anna Mahon, of $500 to each of her sisters, Delia Ray and said Margaret Caney. The defense set forth in the amended affidavit of merits was that prior to her death Anna Mahon changed her beneficiaries, designating her sister Delia and her nieces Margaret and Adele Ray as her beneficiaries, and that, pursuant thereto, the association issued a new certificate to said Anna Mahon, naming them as the beneficiaries, to whom, upon the death of the assured, defendant paid the amount of the benefit. In support, thereof, defendant offered evidence to show that during her lifetime Anna Mahon authorized such change of beneficiaries, and that the old certificate was surrendered and a new one, making said Delia, Margaret and Adele Ray beneficiaries as aforesaid, was issued and delivered with the knowledge and consent of Anna Mahon, and that the benefit had been paid to the beneficiaries designated therein. But the court refused to admit such evidence and directed a verdict for plaintiff.

The by-laws of the association provided that "members may change their designation of person or persons to whom they have assigned their beneficiary, by surrendering to the branch Recorder their beneficiary certificates, having first filled in the blank space for new designation, written on the back of the certificate, and personally signing same." There was evidence that Anna Nelson did not personally sign the application for change of designation, but that it was signed under her direction and in her presence. The court sustained the objection to the offered application on the ground that the change was not made in conformity with the by-laws of the association, and that although when said Margaret Casey had no vested right in the certificate, she had a right to know that the change was legally made. But this view ignored the fact that the association could unquestionably waive such provision, which was made for its benefit and not that of the beneficiary. (Delaney v. Delaney, [illegible]; Fleck v. [illegible], 50 Minn. 396). In the Delaney case it was said that "the parties to the contract may agree between themselves upon the change of the mode of appointing a new beneficiary," and that if the change is made by the member with the consent of the society, "it is immaterial whether or not the requirements of the by-laws upon that subject have been complied with or not;" and "that the society may waive compliance with the required formalities." It is also there quoted from Niblack on Benefit Societies & Accident Ins., (2d Ed.) Sec. 419, as follows: "When a society has actually changed the beneficiary at the request of the member, all questions as to whether the manner or mode of changing the beneficiaries provided in the contract

have been followed, are concluded and absolutely disposed of."

The proof offered tended to show authorization of the change by the assured and consent by the association and that the certificate under which Margaret Casey was a beneficiary had been surrendered and superseded by a new contract with the assured. (Id.) The court erred, therefore, in not receiving the proof offered which presented proper questions of fact for consideration by the jury. Under such circumstances, it was error to direct a verdict for plaintiff. The judgment will be reversed and the case remanded.

REVERSED AND REMANDED.

481 - 20813

THE WEBER CHIMNEY COMPANY, a corporation,
Appellant,

vs.

THE BRUNSWICK-BALKE-COLLENDER COMPANY, a corporation,
Appellee.

Appeal from Polk District Court,

COOK COUNTY.

195 I.A. 9

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The principal question presented by this appeal is whether there was any evidence tending to establish plaintiff's cause of action, the court having on defendant's motion directed a verdict in its favor at the close of plaintiff's evidence.

The action was for damages for a breach of contract, plaintiff averring, and introducing evidence tending to show, that defendant broke the contract in not permitting plaintiff to proceed with the erection of a chimney, and defendant pleading as a defense that plaintiff had totally renounced the terms of the contract and its obligation to complete the construction of the chimney according thereto. The verdict was directed evidently on the theory that plaintiff's own evidence established such defense.

The contract consisted of a written proposal and acceptance. Plaintiff's proposal was to erect a chimney at Dubuque, Iowa, of re-inforced concrete construction 185 feet above the base of a foundation 13 feet below grade. The excavation and preparation of the ground therefor were to be made by defendant. The proposal was dated July 14, 1911, and called for prompt acceptance, which was given by letter two days later stating that the excavation would be completed about August 1st, but it was not in fact done until December

12th. In a letter in September plaintiff expressed anxiety to do the work before cold weather. However, it undertook to perform its contract without any express modification of its terms. It laid the foundation in the four days following December 12th, when freezing weather set in. The evidence shows that cement will not set in a temperature below 26 degrees above zero without employing artificial heat, and that its use would have required much expense and the erection of a building around the chimney structure. It also shows that owing to delays in transporting the 'form units' required for cement construction and increasing cold weather, - the mean temperature most of the rest of December being below 26 degrees above zero, and in January below zero, - no further work in actual construction was done. But the material therefor had already been shipped to Dubuque.

The proposal contained these provisions:

> "Material will be shipped in 5 days from receipt of order to ship, and about 30 working days are required for the completion of the work. * * * "
>
> "The delivery, erection and completion promised are contingent upon strikes, accidents or other causes of delay beyond our control."

On January 4th representatives of the parties had an interview in which the causes of delay as aforesaid were explained by plaintiff's representative, he saying "we are going to do the best we can to get it done, and the fact that it has got into winter is not our fault." Defendant's representative asked if plaintiff would agree to complete the chimney by February 20th. Plaintiff's representative said it depended on the weather, that they were going to get the job done as soon as they could, but were not going to promise impossibilities. Defendant's representative expressed a purpose to cancel the contract against which

plaintiff's representative protested. Two days later defendant's attorney called up the latter by telephone and asked if he would agree to complete the chimney by March 1st, to which he replied, "we will if we can, but it all depends on the weather." On January 9th defendant wrote plaintiff a letter referring to such conversation and saying it left no alternative but to cancel the contract, and taking the position that plaintiff had practically abandoned the contract. Plaintiff declined to accept the cancellation and evinced its readiness to proceed with the work.

Plaintiff undertook to prove that the term "working days" had by usage a special meaning in the trade or commerce of concrete construction. Defendant contended that the words have a definite and settled meaning in commerce and jurisprudence, that of days as they succeed each other exclusive of Sundays and holidays; that the language of the contract was clear and unambiguous, and that parol evidence of its meaning was incompetent. While the court took defendant's view it nevertheless heard evidence on the subject out of the hearing of the jury, but in directing the verdict treated it as received.

But, as we view the case, Plaintiff's right of recovery under the evidence presented did not depend on the competency of such proof. Plaintiff's evidence tended to show the expense it had incurred in preparation for and partial performance of the contract, its readiness to complete the same, and the cancellation thereof by defendant because plaintiff would not guarantee completion of the structure by February 20th or March 1st. The court evidently adopted defendant's theory that plaintiff's refusal to make such guarantee or new promise was a renunciation of its obligation to com-

plete the structure within the time contemplated by the contract, and constituted a breach of the contract which prevented the right to recover either under the contract or on a quantum meruit for the work performed.

In this we do not concur. Even though plaintiff recognized that it could not complete the structure in the required time, that did not constitute a renunciation of its obligations. But there was no absolute agreement that plaintiff would complete the structure in a definite time. The proposal estimated that "about 50 working days would be required," and made express provision for causes of delays beyond plaintiff's control. It might be said that the evidence as to delays presented a question of fact for the jury. But we need not consider that phase of the case, for applying to the evidence defendant's construction of the words "working days" the court's action was unauthorized. Computing the time from December 12th, when the ground was ready for plaintiff to begin work, and excluding Sundays and holidays, about 22 "working days" had elapsed when defendant cancelled the contract (although the evidence tended to show it was at that very time refusing to carry out its own obligations as to payments past due), and there remained about 33 and 41 additional days to February 20th and March 1st, respectively. In other words, regardless of any causes of delay which might ensue to excuse performance within the period, defendant was allowing plaintiff about 55 or 63 days at most for completion of the structure. In view of the language of the contract plaintiff was not limited to exactly fifty days, and was entitled to a reasonable extension of that period depending on facts and circumstances in connection with excusable causes of delay. No one could have predicted on January 5th, when de-

fendant cancelled the contract, that such causes would not intervene so as to extend a reasonable time for construction under the contract even beyond March 1st. Plaintiff had a right to rely on the provisions of the contract as to delays, and, from the nature of the contract, the character of the work and the season of the year, to anticipate that valid causes for delay might arise so as to render it impossible to complete the structure within the time defendant required. It was unreasonable, therefore, to exact such a promise or to limit the time for performance to the period stated. The contract did not as a matter of law admit of the construction as to the limit of time put upon it by the court, and refusal to agree to perform within such period did not constitute an abandonment of the contract by plaintiff nor renunciation of its obligations to comply with the terms thereof. Had plaintiff been permitted to complete its contract, which it stood willing to perform, it might for aught that appears in the evidence have been able to have completed it within the reasonable time contemplated by the contract without taking into consideration whether the causes of delays prior to January 9th came within its terms.

The case should have gone to the jury. The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

497 - 20830.

EUGENE A. BOURNIQUE, Appellee,	APPEAL FROM SUPERIOR COURT COOK COUNTY.
vs.	
JOHN B. DRAKE, et al, on appeal of JOHN B. Drake, Appellant.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit for broker's commissions based upon the claim that the plaintiff, Bournique, was the authorized agent of defendant, Drake, to find a purchaser of certain real estate belonging to the estate of John B. Drake, Jr., and that he was the procuring cause of the sale thereof. Judgment was for plaintiff for $27,500, - 2½% of $1,100,000, the price for which the property was sold.

We have carefully considered the evidence and the force of the inferences drawn by counsel on both sides from very conflicting and irreconcilable testimony, and are firmly impressed that the judgment must be reversed on the ground that the preponderance of the evidence is against the verdict so far as it implies that plaintiff was the procuring cause of the sale.

Two main facts essential to recovery were stoutly contested, (1) Bournique's agency, and (2), that he was the efficient or procuring cause of the sale. If the case depended alone on establishing the former, we might not, in view of the character of the conflicting evidence on that subject, disturb the jury's finding, depending, as it largely does, on the jury's view of the credibility of the witnesses.

But this is not the case with the other important fact which plaintiff was bound to establish to entitle him to recover and which he failed to do by a preponderance of evidence. Consideration of the evidence bearing on that subject will obviate the necessity of discussing the alleged errors in the course of trial.

The property in question was purchased by the trustees of the estate of Marshall Field, July 7, 1910. They were Chauncey Keep, Arthur E. Jones and the Merchants Loan & Trust Company, for which its president, Orson Smith, and in his absence its vice president, A. H. Hulbert, acted. All negotiations in which the terms of sale were discussed, settled and concluded were had directly between defendant Drake, acting for the owners, and one or more of the trustees of the Field estate. With these negotiations plaintiff had nothing to do. In fact, he was entirely ignorant of them. The main question is whether he brought them about.

The evidence shows that the property was first offered to the Field estate by defendant Drake. This was in 1907 and 1908. Plaintiff brought the matter before the trustees, whether in 1908 or 1909, about which there was some controversy or doubt, is immaterial, but it was after Drake's offer.

It is undisputed that plaintiff had several conversations with defendant Drake relative to effecting a sale of the property, - Drake claiming Bournique was to get commissions in case of a sale from the purchaser - that Drake put a price of $1,250,000 thereon; that plaintiff had several interviews with two of the trustees, Keep and Jones, relative to inducing a purchase of the property by the Field estate, and that to the same end he enlisted the service of Hugh T. Birch, who inter-

viewed Keep and Jones, and also Orson Smith on the subject. But it does not appear whether the trustees, as such, ever considered the offers or when they decided to make the purchase or that their action was induced by or the result of the interviews had with either Bournique or Birch. The most that can be claimed in behalf of plaintiff is that the evidence shows he submitted an offer to the trustees for $1,250,000, and that subsequently they purchased the property, though at a sum $150,000 less. While evidence of his efforts and the fact of a sale might, without explanation, tend to show he was the procuring cause of the sale and warrant submission of the question to the jury, yet such facts are not inconsistent with defendant's testimony tending to show that other influences were controlling.

It appears that the trustees, or some of them, knew this property was in the market, but that they were not in a position to give the matter serious consideration either when Drake or Bournique submitted an offer, because proceedings were then pending in court to construe the power of the trustees to sell and purchase real estate, and that after obtaining a decree favorable to the exercise of such power, the trustees had to wait for funds to accumulate before they could entertain a proposition. Of these facts both Bournique and Birch were advised, and the last action taken by either of them respecting the matter was to advise Drake that there was nothing to do but to wait. Up to that time, which was early in 1910, there is nothing in the record to disclose that the subject had ever been taken up or considered by the trustees, individually or as a body, and the evidence tends strongly to show that they never offered Bournique any encouragement to believe that they would consider making a deal through him, and we find little, if anything, in the record to disclose that his repeated

efforts operated to bring about the purchase. In fact, he knew that the trustees had been closely associated with members of the Drake family in a business, if not a social, way, and they gave him to understand that the property had already been offered to them by Drake at the same price and if any deal was made it would be made directly with the Drakes themselves. Keep testified that at the last interview with Bournique, early in the spring of 1910, he told him that after what had passed between the Drakes and himself, he could not take the matter up with a broker if the trustees were at any time disposed to purchase the property.

A letter from Bournique to Keep, written November 5, 1909, says: "I remember you told me that you knew the Drakes very well and spoke of your associations with them in connection with the Illinois Trust & Savings Bank, and of your opportunity of buying this property before I mentioned it to you, and on that account you did not feel that you could consider a proposition to purchase through me for the Field estate. * * * * If you want this property, would you not just as soon buy it through me, as the price asked for it, $1,250,000, is the same, Mr. Drake says, that was given to you a long time ago, or make an offer and I will submit it and do my best to bring the parties together. * * * It is not only business but a friendly act that Mr. Drake is conferring upon me in extending me the privilege of acting as their broker, but I assure you it is no intention of mine to interfere. I shall value your opinion as to my position and appreciate anything you see fit to do for me in this regard." This letter and Keep's testimony support the contention of the defense that Bournique was given to understand from the first that Drake had offered the property to the Field estate and that the trustees intended to deal with the Drakes personally if they

should consider a purchase.

Both Keep and Jones testified that the interviews with Bournique had no influence upon them or the other trustees in making or completing the purchase. While such evidence is not conclusive, it was the only direct evidence on the subject. Orson Smith did not testify, and Hulbert, through whom final negotiations for the purchase were begun and carried on, testified that he never saw Bournique or Birch or knew that they were in any way interested in the sale of the property, and there is no testimony to the contrary.

It appears that sometime in April, 1910, while defendant Drake was in Hulbert's office in the Merchants Loan & Trust Company's Bank on other business, the matter of the purchase of the property was in some way brought up and Hulbert said: "If you still want to sell and will come down to a reasonable price, we will take it up." The offer of $1,100,000 was made and, after consideration by the Drake heirs, accepted. Prior to that time Birch had suspended his efforts, telling Drake there was nothing to do but to wait, and at the last interview Bournique had on the subject, which was sometime earlier in the year, Keep repeated to him what he had stated at the beginning, (as shown by Bournique's letter), that if the Field estate made a deal, it would be made directly with the Drakes themselves. We fail to see how on such a state of facts it can be said that plaintiff was the procuring cause of the sale.

But it is contended by appellee that negotiations with Drake had been broken off when Bournique submitted his offer. We think it can hardly be said from the record that any negotiations were actually commenced until Hulbert took up the matter. If the trustees took it up in any way, formally or informally, before that time, it does not appear in the record,

and if their failure to take up and consider Drake's offer can be regarded as abandonment of negotiations, then the same may be said of Bournique's offer, he having suspended any efforts to induce action because informed that the estate was in no position to consider a proposition, and that the trustees would deal directly with Drake if at all. In the absence of more direct evidence in the record, the inference that Drake's offer was tentatively under consideration until an opportune time for negotiations should arrive is as palpable as that the trustees were induced to act on Bournique's offer at the very same price. This inference may well be drawn from these important facts: (1) The property was in close proximity to the large retail store of Marshall Field & Company, and seemed desirable for the Field estate, which presumably had funds for investment; (2) said estate was among the few that were likely to take up a deal of that magnitude, which Drake as well as Bournique well knew; (3) the trustees knew that the property was in the market and probably, by reason of the foregoing facts, had its purchase in view from the time Drake submitted an offer and contemplated making negotiations when assured of their power to purchase and funds were available for that purpose; (4) the trustees knew the members of the Drake family as business associates if not socially, and that they could effect as good a bargain with them directly as through the intervention of agents; (5) they so expressed themselves to Bournique, treating his persistent efforts with courtesy but taking no action thereon, and (6) finally, when ready to act, they took the matter up directly with Drake.

Whether Hulbert, who knew nothing of Bournique's or Birch's interviews, took up the matter on his own responsibility without previous conference with the trustees on the subject does not appear. More testimony might be had on this

subject and whether the interviews with Hournique or Birch were discussed by the trustees or induced them to take the matter up for consideration. As more evidence may unquestionably be had on this important phase of the case, without which there is insufficient evidence to support the judgment, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

514 - 20847

CHARLES J. BRANT, doing business as CHICAGO SPECIAL CONSTRUCTION COMPANY, Appellee, vs. COLUMBIA WESTERN MILLS, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This action was brought to recover the balance claimed to be due under a written contract between appellee as contractor and appellant as owner, who were plaintiff and defendant respectively and will be referred to as such.

The contract called for the construction of a large concrete tunnel 441 feet long for carrying steam pipes, and of conduits for carrying electric cables, and also some incident work at the price of $8000, of which $6000 was paid. Plaintiff's claim was for said balance and some extras. Defendant denied legal liability and claimed grounds for recoupment.

The contract was made October 31, 1912, and was to be completed about January 1, 1913. The construction work was finished March 13, 1913, but the contract required the contractor to restore certain fences that had to be removed in the course of the work, and to do the back-filling, which meant to fill in the sides of the tunnel excavation and cover the top of the tunnel with the earth that had been removed, a large part of which remained undone at the time this action was begun. On April 25th, plaintiff requested the architect to issue him a certificate for the "balance" of the contract price. It was not

issued. On May 3d plaintiff did some back-filling but did not complete it and performed no work thereafter. On May 19th the architect notified him to complete the back-filling and replace the fences. A conference between them followed on May 24th. The plaintiff claimed and the architect denied that they then reached an agreement to charge the plaintiff the sum of $710 for the unfinished work and deduct it from the contract price. On May 26th 48 longitudinal feet of the tunnel caved in, which the architect claimed plaintiff should restore. On June 10th plaintiff again requested the architect for a final certificate, which was refused. This action was begun June 15th. Subsequently defendant performed the unfinished work of back-filling and restoring the fences at a cost of $177.71, and repaired the tunnel at a cost of $1682.33.

The contract reads in part as follows:

> "Article III. Subject to additions and deductions as provided for in the General Conditions of the contract, the Owner agrees to pay to the Contractor for the performance of the Contract the sum of Eight Thousand Dollars ($8000.00) in current funds <u>but only upon certificates signed by the Architect</u>, as follows: During the satisfactory progress of the work, on or before the 10th day of each month, 80 per cent of the value of labor and materials wrought into the building up to the first day of that month, as estimated by the Architect, less the aggregate of previous payments. <u>On the satisfactory completion of the entire work</u>, a sum sufficient to increase the total payments to Ninety per cent of the value of the work, and <u>Thirty days thereafter the balance</u> due under this Agreement."

The case turns mainly on the application to the evidence of the words we have italicized.

The issues presented by the pleadings were whether plaintiff had fully performed his contract and whether the architect had fraudulently refused to issue a certificate for the balance due thereon. If plaintiff failed to maintain the first, it is unnecessary to consider the second. It was incumbent on him to prove both by a preponderance of the evidence. It is conceded that he was obligated by the terms of the contract to restore

the fences and do said back-filling and that they were left unfinished, but he contends here that notwithstanding such omissions there was a substantial compliance with the contract on his part, and relying on the unquestioned doctrine that, where there is no wilful departure from a building contract in essential points and the contractor has honestly performed the contract in all its substantial and material particulars he will not be held to have forfeited his right to a recovery by reason of "technical, inadvertent or unimportant omissions," (Peterson v. Pusey, 237 Ill. 234, and cases there cited) he argues that the matters left undone were of minor importance, as they had no direct relation to the work of construction which was the main subject of the contract, and as the cost of performing them was less than 2% of the contract price.

The court left the question of substantial compliance to the jury. But upon the undisputed evidence as to what was left undone, it became a question of construction of the contract, which was for the court, and in giving it construction, it could not ignore the express provisions of the contract which called for the performance of work of a material and substantial character. As said in Canal Trustees v. Lynch, 5 Gil. 521, "the contract between the parties, so far as the record shows, was voluntarily and fairly entered into. Neither party is at liberty to disregard it, nor can the court make for the parties a contract different from that which the parties have made for themselves." (p.526). The unfinished work cost a substantial sum, and as said in the case of Van Clief et al v. Van Vechten, 130 N. Y. 571, involving a similar contention, "that is not substantially finished which requires a substantial sum to finish it." In our opinion, the importance of such work is not to be tested by the proportion of its cost to the full contract price when, considered by itself, it was a material

and substantial part of the work the contractor agreed to perform, and his omission to perform the same without the owner's consent constituted failure to perform the contract in material and substantial particulars, and cannot reasonably be deemed such a mere technical or unimportant omission as justifies application of the doctrine of substantial compliance.

And this was evidently plaintiff's view of the case at the trial, for in his main case he unquestionably relied upon proof of a waiver of performance. Over defendant's objection he made proof of said alleged agreement between the architect and himself for a deduction of the cost of the unfinished work from the contract price. Having pleaded full performance, he could not, of course, recover on proof of waiver of performance. (Metal Co. v. Royce, 235 Ill. 284; Hart v. Carsley Mfg. Co., 221 Ia. 444). He here contends, however, that such evidence was not offered in reliance upon waiver of performance, but as material to the question of the amount to be deducted. The record does not indicate that that was the purpose of the evidence, nor was it competent for such purpose. The actual cost of finishing the work was the best evidence of what should be deducted unless it was a matter of express agreement and relied on as such.

Although defendant moved to strike out such evidence as incompetent under the pleadings and for the further reason that there was no proof that the architect was authorized to enter into such agreement for defendant, yet the record does not disclose that plaintiff asked for an instruction limiting such evidence in accordance with his theory of its competency.

Furthermore, the fact that plaintiff claimed that such an agreement was entered into May 24th is inconsistent with his contention that he had completed the contract before that time, for the essence of the agreement was to release him

from full or further performance. Not until then at best could he claim completion of his contract, and according to its provisions above quoted, the balance for which this suit was brought was not due thereunder until thirty days after "completion of the entire work," and, therefore, not until June 23d, five days after the suit was brought; and as the contract provided that payment was to be made "only upon certificates signed by the architect," plaintiff, upon his own theory of the facts, was in no position to require a final certificate before June 23d, and, therefore, cannot reasonably contend that the refusal of the architect to issue the certificate before the latter date, was fraudulent.

By the very terms of the contract, therefore, the right to a recovery depended upon obtaining a certificate from the architect showing the amount due, and the obtaining of such certificate was a condition precedent to any right of action to recover such balance. (Michaelis v. Wolf, 156 Ill. 55). It was said in the case cited that such condition must be strictly complied with or a good and sufficient excuse shown for not complying therewith.

The contract also provided that the final decision of all questions arising under it was to be made by the architect and that such decision should be binding upon the parties to the agreement and "a condition precedent to any right of legal action," except that in case of dissent from such decision as to certain matters they were to be submitted to arbitration within a certain time. Unquestionably the issuing or refusal to issue a certificate would involve such a decision by the architect. No arbitration over the alleged grounds for refusing a certificate was asked for in the case at bar and if asked for, it also was by the terms of the contract a condition precedent to a legal right of action.

Only one other question need be considered. The contract, as above quoted, made 90% of the contract price due on completion of the contract, and an action might have been maintained for that remained unpaid up to 90% when the suit was brought provided the contract could on any theory of the case have been deemed completed at that time, and the architect had fraudulently refused to issue a certificate therefor. But the record does not show a demand for such a certificate. The proof was that the demand was for a certificate for the entire balance of the contract price, and the suit was framed and tried upon the issues that the entire balance was due and wrongfully withheld. The judgment, therefore, must be reversed, (1) because, applying the terms of the contract to essential and undisputed facts, the action was prematurely brought, and (2), because there could be no recovery on proof of waiver of performance when the issues are formed on the allegation of full performance.

REVERSED.

527 - 20860.

EDWARD J. BAKER,
Appellee,

vs.

J. VERNE BENJAMIN and
FRED MEYER, (defendants),
on appeal of FRED MEYER,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

195 I.A. 17

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Baker, who conducted a tin-shop, went to one Benjamin, a loan broker, to obtain a loan of $500. The latter agreed to procure it on Baker's note secured by a chattel mortgage on property in the tin-shop, both of which were executed by Baker together with an assignment of accounts, and placed in Benjamin's hands. A few days later, being indebted to appellant Meyer, Benjamin gave Meyer his note to cover his indebtedness and for $100 additional cash, and as collateral thereto Baker's note and mortgage. Being advised that under the statute Baker's note, secured by a chattel mortgage, was non-negotiable, Meyer, before said transaction with Benjamin visited Baker's shop to make inquiry about the note. Baker was out and what conversation he had was with Baker's brother who was left in charge of the shop. While Baker's note was for $550, he was to receive but $500. At the time of its execution, Baker signed a receipt for $50, which Benjamin claimed he then gave Baker. The latter claimed that he received no money and the transaction was merely to cover up usury. The loan not having been consummated, Baker filed his bill in equity to cancel his note and mortgage, claiming

ignorance of the transaction with Meyer and that he had not executed an assignment of his accounts. Pursuant to the prayer, a receiver was appointed to take possession of the note, mortgage and purported assignment. The case was referred to a master to take proofs and report findings and conclusions. The master found that the $50 for which said receipt was given was not paid, that the assignment of accounts and the note and mortgage for $550 were executed by Baker, but that there was no consideration therefor.

It is urged by appellant, (1) that the preponderance of evidence is against the finding that $50 was not paid, and (2) that Baker is estopped as against Meyer from attempting a rescission.

As to the first contention it is enough to say that after a careful examination of the evidence taken by the master, who had the advantage of seeing and hearing the witnesses whose testimony was at variance, we do not feel justified in disturbing the court's approval of the master's report thereon, it not being obvious that his conclusions were not correct.

As to the second contention it is not well taken. Even if Baker's brother was authorized to speak for him on the occasion of Meyer's visit, still there was nothing said from which Meyer had the right to infer that Benjamin was a holder of said note and mortgage for a valuable consideration. He made no inquiry as to that, or as to the purpose for which Benjamin held them. There was no consideration for the note if the $50 was not paid, and Meyer, not being led by Baker or his brother so to believe, there was no room for the doctrine of

estoppel.

Appellee assigns as cross error that the decree fails to find the receiver was entitled to a fair and reasonable compensation and to fix and tax the same as costs.

We find nothing upon which to predicate such error. While the decree approves of the receiver's report previously filed and discharged him, there is nothing in the record to indicate that the question of his compensation was ever brought before the court for consideration, as should have been done in the regular course of procedure before entry of final decree. The matter should have been brought up on motion by the receiver and a hearing had thereon if necessary. but error cannot be assigned that the court did not take the matter up on its own motion, for that is the effect of the assignment.

AFFIRMED.

530 - 20863.

DeWITT . CREGIER, Custodian of lost and stolen property, etc. of the City of Chicago, Appellee,	APPEAL FROM CIRCUIT COURT COOK COUNTY.
vs.	
GEORGE REMUS, et al, Defendants,	
A. J. BEDARD, Appellant.	1931.A.18

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Remus and Bedard, attorneys-at-law, were defendants to a bill of interpleader filed by appellee Cregier, as custodian of lost and stolen property for the department of police of the city of Chicago, each claiming title to jewelry taken from the person of a prisoner named Stone.

The facts upon which their respective claims are predicated were substantially as follows: In July 1912, Stone was arrested in Chicago, and gave Remus $100 to procure a bondsman for him. Later he became a fugitive from justice and was arrested in Kansas City. Feeling under obligation to procure his return, Remus paid the expenses of Higgins, a Chicago policeman, to bring the prisoner back to Chicago. The jewelry found on Stone when rearrested in Kansas City was handed over to Higgins and, on his return to Chicago, he delivered it to Cregier as such custodian. Remus testified that when Stone was first arrested he agreed to pay him $200 as retainer out of which he was to pay the bondsman and expenses in the criminal case, and that after Stone paid the

$100 aforesaid, he went to see Stone about the balance and Stone said that if Remus would get him out of jail, he would pay the balance of $100 upon getting out, and he would give him the jewelry in question, but Remus did not receive the jewelry from Stone at any time. On the contrary, it appears that Stone left the state when released from jail and took the jewelry with him, evidently with no intention of keeping his promise. After he was brought back to Chicago and lodged in jail, he engaged Bedard as his attorney and gave him a bill of sale of the jewelry of which Bedard promptly notified said custodian and the chief of police. Higgins testified that, while returning from Kansas City, the prisoner said the jewelry in question, then in custody of Higgins as officer, belonged to Remus and directed him to deliver it to Remus, but that later he offered it to him as the price of escape. Later still, Stone claimed the jewelry belonged to his wife. Remus testified that he asked Stone why he "jumped" his bond, and that he replied that Remus was secured by the jewelry for what he owed him. The prisoner denied both Higgins' and Remus' testimony. Before Higgins delivered the jewelry to Gregier, Remus gave him notice of his ownership.

From the foregoing circumstances Remus claims a prior oral assignment of the jewelry. But the contention is untenable. At most they disclose a mere unfulfilled promise to deliver personal property in the future as security or otherwise, and not an assignment, legal or equitable, and that Bedard got legal title thereto by the bill of sale. The evidence did not justify a finding and decree in Remus' favor.

It was also error to require Bodard to pay a portion of complainant's attorneys' fee. (Chapin v. [illegible], 57 Ill. 308; Delta & King Land Co. v. Harwood, [illegible] Ill. App. 166).

The decree will be reversed and the cause remanded.

REVERSED AND REMANDED.

533 - 20866.

LILLIAN Mac NEAL, appellee,	
vs.	APPEAL FROM COURT COURT OF [illegible] COUNTY.
R. J. CHAMBERLAIN, appellant.	

195 I.A. 20

MR. JUSTICE BRENTANO DELIVERED THE OPINION OF THE COURT.

This was an action brought on an oral contract for employment for one year at $25 per week, to recover for a portion of the year plaintiff was not given employment. The defense was that the contract was for service in a particular building afterwards destroyed by a flood, and that the contract contemplated its continued existence, and therefore the destruction of the building terminated the contract and excused further performance.

Two points only are argued in appellant's brief. The first involves inquiry into the sufficiency of the evidence to sustain the judgment, but a motion for a new trial is necessary for that purpose, and none is shown by the record. (Pyle v. Blair-Big Muddy Coal Co., 262 Ill. 128; Lax v. Fletcher, 84 id. 45; Reichwald v. Gaylord, et al. 75 id. 503). The second involves an instruction applicable to defendant's theory of the contract, but it does not appear from the record at whose instance any of the instructions were given. For aught the record shows appellant may be complaining of an instruction given at his own request. As stated in Martin v. C. A. M. Elec. R. R. Co., 220 id. 97,

> "It is important to know at whose request the instructions were given, in order that any alleged error in giving the same may be properly considered. It is not the province of this court to resort to conjecture for the purpose of determining whether an instruction has been given at the request of appellants, or of one of them, or of the appellee, * * * or by the court of its own motion, but it is the duty of the parties bringing the record to this court to make the alleged errors clearly appear, the rule being that the bill of exceptions is their pleading and must be taken most strongly against them."

In connection with the latter point, it is also argued that there was error in rejecting proof of defendant's contract for the building in question. There was no reversible error in the ruling. The only effect of the proof would have been to corroborate an undisputed question of fact. The judgment will be affirmed.

Affirmed.

568 - 20903

[illegible] Acceptance Co., a corporation, Appellant,	
vs.	APPEAL FROM COUNTY COURT OF COOK COUNTY.
JOHN F. O'BRIEN, Appellee.	

1951.A.24

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal to reverse a judgment sustaining a demurrer to the declaration and dismissing the suit. The declaration is upon an assignment of wages made to secure two certain notes described therein. It avers that the plaintiff corporation acquired title to said notes in due course of business; that to secure them one of the makers thereof, then in the employ of the defendant, O'Brien, executed an assignment of his salary in writing, of which O'Brien was duly notified, and that said maker of the note had since such notification, while in the employ of said defendant, earned a sum in excess of the amount due on said notes.

The declaration fails to allege that the notes, for which the assignment was mere security, remain unpaid or that there was any demand for their payment, or, as expressly required by Section 18 of the Practice Act, that plaintiff is the actual bona fide owner thereof, or that the wages were due and payable at the time of the commencement of the suit. For these defects, without regard to others alleged, the demurrer was properly sustained.

[illegible].

578 - 20915.

W. C. JOHNSON, trustee estate of JACOB SHYNMAN, bankrupt, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
ABRAHAM L. GOLDBERG, et al, Appellants.	195 I.A. 25

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The original statement of claim averred that defendants agreed to pay Shynman's creditors $5,022.12, and the amended statement, that they agreed to pay Shynman that sum for the benefit of his creditors. The case was heard and submitted to the jury on the theory that plaintiff could recover only on an agreement by defendants to pay all Shynman's debts, and that they amounted to said sum. The verdict was for $3000.

Plaintiff's evidence tended to support his allegations, and defendants' tended to show that they agreed to pay Shynman only $3000 but for Shynman's stock and machinery and an encumbrance thereon, and that they performed their agreement. The verdict was not conform to either theory of the evidence. The jury evidently accepted defendants' version of the contract but rejected their claim of payment. The jury were instructed however, that unless they found the defendants agreed to pay all the debts of Shynman as charged in the statement of claim, they must find against the plaintiff and for defendants, and also that unless they found from the evidence that a definite amount was agreed upon between the parties, their finding should be for defendants. That Shynman's debts amounted to $5,022.12

is not questioned. If the agreement was to pay all of them, then the verdict could not, in the absence of proof of partial payment, reasonably be for part of them. The verdict is so inconsistent with the theory of the suit and these instructions and so irreconcilable with the evidence that it cannot be deemed otherwise than a mere compromise, and under such circumstances the judgment can not stand. It would, therefore, subserve no purpose to review the conflicting claims or the arguments in support thereof. Substantial justice requires not only the reversal of the judgment, but a remanding of the cause for another trial in accordance with the pleadings as they stand or may be amended. The plaintiff cannot make one claim in his statement and recover upon one entirely different. (Walter Whitney Co. v. Dugnell, 150 Ill. 416).

REVERSED AND REMANDED.

99 - 20410

MARIE HANSEN and HERMAN BUSCH, copartners under the firm name and style of HANSEN BUSCH AUTO COMPANY, Plaintiffs in Error, vs. ALBERT G. FERREE, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

STATEMENT OF THE CASE. This suit is based upon a verbal contract to recover for labor and material furnished in erecting and equipping an automobile.

All of the items of labor and material set forth in plaintiff's affidavit of claim, were disputed by the defendant. The principal contention, however, relates to the number of hours of labor expended on said car. There was a trial by jury, who found the issues against the plaintiffs, and judgment was entered thereon.

The only witnesses who testified as to the contract price for labor were Herman Busch, one of the plaintiffs, who testified that seventy five cents, and Albert G. Ferree, the defendant, who testified that seventy cents, was the agreed price per hour for labor to be performed on said car.

Busch and Carl Ostergard, the latter an employee of plaintiff, were the only witnesses who testified in behalf of plaintiffs as to number of hours of labor. Ostergard testified that he worked 84-1/2 hours on the said car, and Busch testified that it took about 1000 hours to finish the car. On March 27th, 1911, when the car was received by the plaintiffs, the latter had in their possession 15 other automobiles for repair, and until the return of the car to Ferree, covering a period from March 27th, 1911, to August 15th,

1911, plaintiffs had in their employ at the same place 12 to 20 men daily, engaged in similar work on various cars, the time spent on each car varying from a few minutes to several hours.

Further work was done on the car in question during November, 1911. Busch testified that he superintended and did some of the work on the car, and that each man, as he completed his daily work, would make out a time card showing thereon the name of the workman, date, owner of car, kind of work, material used and number of hours of work spent on each car. Busch further testified that every evening he checked up each card with the work done on the car during that day, then gave the card to the bookkeeper, who entered same in the day book after the work was finished. The only time cards admitted in evidence were those identified by Ostergard as having been made by him, indicating that he had worked 84½ hours on the car. Busch testified that from March 27th to August 15th, 1911, men worked on the car practically every day. This was denied by Ferree, who, during such period visited the shop three times a week and who testified that for four weeks during said period no work had been done on the car.

MR. JUSTICE McGOOGHY DELIVERED THE OPINION OF THE COURT.

The plaintiffs urge two grounds for reversal: (1) That the Court erred in refusing to admit in evidence certain of the time cards of the workmen of the plaintiffs; (2) That the verdict is manifestly against the weight of the evidence. These time cards were properly identified and in view of the testimony of Busch, the Superintendent, should have been admitted in evidence. Chisholm et al. v. The Seaman

Machine Company, 160 Ill. 101. Certain of these cards, namely, those identified by Ostergard, 26 in number, were admitted in evidence by the court. In addition to these 26 cards, only 15 of the cards that were offered in evidence by the plaintiffs and excluded by the trial court appear in this record; this Court is left to conjecture, therefore, what the other cards contain which were offered in evidence by the plaintiffs and excluded by the court. The time cards admitted in evidence, together with the time cards excluded, which were made a part of the record in this case, purport to show that 144 hours of labor had been expended by plaintiffs on the automobile of defendant, which labor item, computed at 75¢ per hour, the price claimed by plaintiffs, amounts to $108.00. The material furnished defendant by plaintiffs according to plaintiffs' testimony, amounted to $319.57. It is admitted that plaintiffs' received, on account, from defendant the sum of $600.00, or $172.43 in excess of the amount for which plaintiffs could recover, if all of the cards which were made a part of this record had been admitted in evidence. In view of this state of the record, the plaintiffs are not now in a position to complain of the error committed by the trial court in refusing to admit in evidence the cards excluded.

The credibility of Busch and the other witnesses who testified in behalf of the plaintiffs, and the weight to which their testimony was entitled, was determined by the jury.

We are unable to say from a careful examination of the record in this case, that the verdict is manifestly against the weight of the evidence, and therefore the judgment of the trial Court will be affirmed.

AFFIRMED.

165 - 20479

GEORGE LUDLOWS & CO., a corp., Plaintiff in Error, vs. HUDSON MANUFACTURING CO., Defendant in Error.	ERROR TO THE MUNICIPAL COURT OF CHICAGO.

1951 A. 28

STATEMENT OF THE CASE. This is an action brought by plaintiff to recover the purchase price of 85 pounds of vanilla beans, the receipt of which and the correctness of the purchase price being admitted by the defendant; a set-off was filed, in which the defendant claimed that the vanilla beans contained formaldehyde and salicylic acid, and that an extract consisting of a maceration of said vanilla beans, grain alcohol, glycerine, and sugar, was found upon chemical analysis, about eight months thereafter, to contain formaldehyde and salicylic acid, neither of which products being normal ingredients of vanilla beans, but are sometimes used as preservatives thereof. Defendant claims that said extract was unsalable and became a total loss.

Wegener, President and Manager of defendant company, testified that only by means of a chemical analysis could have been determined whether or not said beans had been treated by either formaldehyde or salicylic acid. No chemical analysis of the beans at any time was made by either of the parties. There were two shipments of beans of fifty pounds each, following the receipt by the defendant of a sample lot of beans of 25 pounds. Wegener testified that upon investigation by him of the first 50 pound lot, the beans looked as though they had been washed, were not bright, contained string marks, and that he doubted whether they were "a prime cut" as per sample. He stated that at times little worms formed on vanilla beans, that such

beans are cut up, treated with a preservative, washed, and sold on the open market. He stated further that defendant had to and did use the first 50 pound shipment of beans and 10 pounds of the second 50 pound shipment, together with the sample lot of 25 pounds. Wegener further testified that he thereupon informed Berger, the Chicago agent of the plaintiff, that the beans in question had string marks on them, were not what he had bought, and that he preferred to return them. Berger said in reply: "You return them to us and we will credit you with them," whereupon the unused portion of the beans, namely, 40 pounds, were returned to plaintiff, accepted, and credited to defendant's account. Berger testified that the defendant had made no complaint until after the second 50 pound shipment of beans had been delivered to defendant and payment requested therefor.

Plaintiff, who was an importer of vanilla beans, denied that formaldehyde or salicylic acid was used by it, as a preservative of said vanilla beans, or for any other purpose in connection therewith. There was a trial by jury, resulting in a verdict and judgment in favor of the defendant on its set-off for three hundred dollars.

MR. JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks a reversal of the judgment rendered on defendant's set-off on the following grounds:

(1) That there was no evidence that there was any salicylic acid or formaldehyde in the beans.

(2) That even if salicylic acid and formaldehyde afterwards discovered in the extract came from the beans, this was not in violation of any law.

(3) That if the defendant sustained any damage, it was caused by its own negligence.

(4) That the court erred in giving certain instructions to the jury.

The contention of the defendant that, as the plaintiff made no motion for a directed verdict at the close of all the evidence, it is not now in a position to question the sufficiency of the evidence to sustain the verdict, is not well taken. Gall v. Beckstein, 173 Ill. 187. In view of the conclusions arrived at by this court, it will only be necessary to consider the first assignment of error. There is no evidence in this record that either the sample or the beans subsequently purchased by the defendant from the plaintiff were chemically examined, although it is admitted by defendant that only by chemical analysis could have been determined whether or not the beans in question had been treated by either formaldehyde or salicylic acid. The beans in question were inspected by the defendant and about two-thirds of them used as one of the ingredients in making an extract.

The fact that salicylic acid and formaldehyde were found in an extract made from these beans and other ingredients, namely, grain alcohol, glycerine, and sugar, eight months after such extract was made, is not sufficient evidence to show the beans contained either formaldehyde or salicylic acid. A chemical analysis of these beans before use would, presumably, have disclosed any adulteration or deleterious preservative, if such had been used. The use of any preservative or adulteration was denied by the plaintiff. The beans that were not used by defendant were returned to plaintiff and defendant given credit therefor.

The verdict in this case is manifestly against the weight of the evidence and the judgment on that ground must be reversed and the cause remanded.

REVERSED AND REMANDED.

420 - 20752.

J. WALLACE WAKEM, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
COLONIAL TRUST & SAVINGS BANK, a Corporation, Appellant.	)	OF CHICAGO.

STATEMENT OF THE CASE. This is an action by J. Wallace Wakem, vs. The Colonial Trust & Savings Bank, a corporation, for the alleged conversion by said bank of a promissory note in the sum of two thousand dollars ($2000.00), made by John T. Cheney, under date of July 9th, 1912, due four months from its date, bearing interest at the rate of six per cent per annum, endorsed in blank by Clinton S. Woolfolk and the Realty Realization Company, and of forty shares of the capital stock of the said company which was attached to said note as collateral security.

Appellee purchased the note from R. C. Keller, Vice President and Cashier of the Colonial Trust & Savings Bank. About five weeks before its maturity, appellee was called on the telephone by Woolfolk, one of the said endorsers, who told appellee that he was making arrangements with Keller, the said officer of the bank, to take up the note before it became due, and requested appellee to send it to the bank for collection. On October 2nd, 1912, the note with the collateral attached was deposited by appellee's cashier with the bank for collection, and thereupon the bank issued its receipt to appellee, under said date, reciting therein that it had received the note for such purpose. On the same day said endorser's representative called at the bank for the note and gave his receipt therefor.

Appellee denied that he authorized the bank to deliver the note to the endorser, Woolfolk. Keller, the bank officer, said that he had a conversation with appellee on the same day, in which conversation appellee said that the note was being sent to the bank for reduction and renewal, or for some adjustment before maturity. Keller

further testified that when the trust receipt of the said endorser for the note was presented to Keller by the collection teller, Sadler, who was also the assistant cashier, for O. K.; that he, Keller, talked over the telephone with appellee, who told Keller it was all right to deliver the note to said endorser. Keller further stated that several days thereafter, he told appellee that the note had been given to such endorser; that appellee, upon learning that the note had not been paid, said he did not like "the shape it was in." No written authority was given by appellee to the bank to deliver the note to the endorser, and Keller did not recall that he had, at any time, asked for such authority. Appellee testified, that upon learning from Sadler that the note had not been paid, instructed the latter, not to deliver the note to the said endorser, except upon payment thereof, and that Sadler so agreed. Sadler did not testify. Keller admitted that he had not informed Sadler that the note had been delivered to said endorser.

Appellee and his cashier called, from time to time, at the bank, and inquired as to whether or not the note had been paid. Following the death of the endorser, Woolfolk, March 26th, 1913, about five months after the maturity of the note, appellee for the first time, according to his testimony, learned that the bank had delivered the note to such endorser. Neither the note nor collateral has ever been found, and appellee has received no proceeds from either.

There was a finding in favor of appellee, and judgment for $2183.46.

MR. JUSTICE McGOORTY delivered the opinion of the court.

The defense set forth by the Colonial Trust and Savings Bank, appellant, in its affidavit of merits that the note was an accommodation note of which the appellee had knowledge, was not supported by any evidence.

The sole issue of fact presented by the evidence therefore, is - was the appellant authorized by appellee, to deliver the note and collateral in question to the endorser? If no authority was given to the bank by the appellee, to deliver said note to the endorser thereon for collection, such unauthorized act on the part of the bank constituted negligence, and such negligence makes the bank liable for any loss resulting therefrom. First National Bank v. Bank of Whittier, 221 Ill. 319, 330.

It is to be borne in mind that this was a note against Chicago parties, deposited with a Chicago bank for collection. There is no evidence to show that it was not convenient for the endorser, Woolfolk, and Mr. Cheney, the maker, or either of them, to go to the bank and take up their note. If appellee desired to deliver the note for collection to the endorser, it does not seem probable that he would use the bank as an agent for that purpose, instead of making delivery direct to the endorser.

We are of the opinion that the court was justified in finding fr the evidence that the bank was not authorized by appellee to deliver the note to said endorser. The cases cited by appellant where a note was forwarded by the receiving bank to an out of town bank for collection, even when such out of town bank is liable as maker or endorser, are not applicable to the admitted state of facts in this case.

No complaint was made of the propositions of law held by the court, which propositions correctly stated the principles of law applicable to the evidence. It is unnecessary therefore to consider the objections to the propositions of law refused.

We find no reason for disturbing the finding of the Municipal Court.

JUDGMENT AFFIRMED.

279 - 20693.

FRANK H. DERBY, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
EDWARD J. SCHAN, Defendant in Error.	)	OF CHICAGO.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This suit was brought by the plaintiff in error to recover a real estate broker's commission alleged to be due him from the defendant. The defendant and a man named Gudicheen executed a written contract for the exchange of certain real estate. This contract was never consummated. The plaintiff was a broker in the transaction, and the said written contract contained the following provisions relating to commissions: "Brokerage fees to be paid as follows, to-wit: Party of the first part (Gudicheen) to pay to Frank H. Derby two hundred ($200.00) dollars. Party of the second part (defendant in error), to pay to Frank H. Derby two hundred ($200.00)." In addition to this contract, the plaintiff in error also introduced evidence to the effect that he was to receive his commission from the defendant in error when he brought the latter and Gudicheen together in a valid, binding and enforcible contract. It is conceded that the plaintiff in error did bring the defendant in error and Gudicheen together in such a contract, but the defendant in error claimed on the trial that there was an oral agreement between the parties to this suit to the effect that the latter would not be entitled to any commission from the defendant in error, until the contract between the latter and Gudicheen had been actually consummated, and some evidence, tending to prove this claim, was introduced.

The case was tried before the court without a jury, and a finding and judgment in favor of the defendant in error was entered, and this writ of error followed.

During the trial of the case it developed in the evidence that the written contract between the defendant in error and Sudichsen was placed by them in the custody of the plaintiff in error, and that the latter, without consulting either of the said parties, recorded the same. The trial court, when this evidence was introduced, stated that the plaintiff in error, by recording the said contract without the permission of the parties to the same, destroyed his right to recover a commission in the transaction. At the conclusion of the evidence the plaintiff in error submitted the following proposition of law to the court:

> "The court is requested to hold, as a proposition of law, that even though Frank N. Derby & Company recorded or caused to be recorded, the written contract for the exchange of properties in Marinette County, Wisconsin, and in Cook County, Illinois, without authority from either Novak or Sudichsen so to do, that fact alone would not be a bar to the plaintiff's right to recover in this case."

This proposition the court refused to hold. Counsel for the defendant in error has not submitted for our consideration, nor are we aware of any authority that supports this ruling of the trial court. We are satisfied that the trial court's theory of the law was erroneous and that his finding in this case was predicated upon this error.

The evidence is almost conclusive that the agreement between the plaintiff in error and the defendant in error was that the former was to be entitled to his commission from the latter when he brought the latter and Sudichsen together in a valid, binding and enforcible contract, but as there is some evidence tending to support the contention of the defendant in error that there was an oral agreement between the parties to this suit that the plaintiff in error would not be entitled to his commission from the defendant in error until the contract between the defendant in error and Sudichsen had been actually consummated, we must remand the case. The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

250 - 20617.

CHERAN ADAMS & CO., a Corporation, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
JOHN J. BRITTAIN and W. A. BUSHNELL, doing business as JOHN J. BRITTAIN CO., Plaintiffs in error.	)	OF CHICAGO.

1951 I.A. 38

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This is an action of the fourth class in the Municipal court of Chicago. The defendant in error, hereinafter called the plaintiff, sued the plaintiffs in error, hereinafter called the defendants, to recover the purchase price of 1500 gallons of shingle stain, sold by the plaintiff to the defendants at 30 cents per gallon. The case was tried before the court without a jury, the issues were found for the plaintiff, and the damages were assessed at $512; judgment was entered on the finding and this writ of error followed.

The defendants were engaged in the construction of sixteen frame cottages and two brick buildings for the Tuberculosis Sanitarium of the City of Chicago, and the shingle stain in question was to be used in staining the shingles on said cottages. The specifications under which the cottages and buildings were being constructed required a certain brand of shingle stain - "Cabot's No. 320" - to be used in staining the shingles on said cottages. The plaintiff made a proposition to the defendants that it would furnish them with a shingle stain of the same composition and color as "Cabot's No. 320" at 30 cents per gallon. The defendants accepted this offer by letter. The plaintiff delivered 1500 gallons of the stain to the defendant, and after the latter had used 40 or 45 gallons of the said stain they were notified by the architects to stop using it as it was not the kind of stain (Cabot's No. 320) called for by the specifications. Thereupon, the defendants stopped using the stain

furnished by the plaintiff and notified the plaintiff to remove the remainder of the same from the premises of the defendant and refused to pay the plaintiff for any of the stain delivered.

It is conceded by both the plaintiff and the defendant that the contract in question required the plaintiff to furnish a stain of the "same composition and color" as the brand known as "Cabot's No. 320." The sole contention of the defendant is "that the stain furnished by plaintiff was superior in every way to Cabot's No. 320. Because of the warranty that the stain was to be of the 'same composition and color' defendants claim there was a breach of warranty in furnishing stain that was superior to Cabot's No. 320. If it is different it cannot be the same, and if it is superior it is different. This is axiomatic." Whether the stain furnished by the plaintiff was of the "same composition and color" as the brand of stain known as "Cabot's No. 320," as required by the contract, was a question of fact in the case. The court found the composition and color of the two stains to be the same, and we are unable to say, after a careful examination of the record, that his finding in this regard was clearly and manifestly against the weight of the evidence; on the contrary, we are of the opinion that the finding is fully supported by the evidence in the case. Nor do we think that the fact that the stain furnished by the plaintiff was superior to "Cabot's No. 320" (if such was the fact) would make the finding of the court that the stain furnished by plaintiff was of the same color and composition as "Cabot's No. 320 inconsistent, for the reason that the plaintiff introduced evidence which tended strongly to prove that any difference between the two brands of stain (if there was any difference) was due to a different process of mixing and preparation rather than to any difference in composition and color. The present writ of error is, in our judgment, without the slightest merit, and the judgment of the Municipal court of Chicago will therefore be affirmed.

AFFIRMED.

315 - 20344.

ALBERT LORENZ and ARTHUR LORENZ, Co-partners, doing business as LORENZ BROTHERS, Plaintiffs in Error,	) ERROR TO
vs.	) MUNICIPAL COURT OF CHICAGO.
HARRY BLOOM, M. NIDETZ and L. SCHNITZER, Co-partners doing business as NIDETZ & SCHNITZER, BERNHARD W. BERGER, Defendants in Error.	)

1951 I.A. 40

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This is an action of the fourth class in the Municipal Court of Chicago. The plaintiffs in error, hereinafter called the plaintiffs, brought suit against the defendants in error, hereinafter called the defendants, under the Mechanic's Lien Act of 1903, to recover $435, with interest thereon from May 17, 1913, alleged to be due to the plaintiffs from the defendants for labor and material furnished by the plaintiffs as sub-contractors. The case was tried before the court without a jury, the issues were found against the plaintiffs, and judgment was entered on the finding. This writ of error followed.

The evidence shows that the defendants Nidetz and Schnitzer entered into a contract with the defendant Bloom to erect a building for said Bloom at 7304-7308 South Halsted street, Chicago, at a contract price of $19,500; that defendant Berger was a sub-contractor working on said building under a contract with defendants Nidetz and Schnitzer; that plaintiffs entered into a contract with defendant Berger to build certain cement foundations for $1,080, to lay certain cement floors and walks for $385, and to remove certain dirt at a fair and reasonable cost ($10 as shown by the evidence); making the total contract price for the work done by the plaintiffs on said building, $1,465; that the entire work on said building was completed and plaintiffs' work was inspected and found satisfactory by the architect; that the plaintiffs received in payment for work on said

building $1530, leaving a balance due them of $435; that the plaintiffs finished their work under their contract on May 17, 1913, and on July 10, 1913, served notice of their lien on defendant Bloom, the owner of the premises. The present suit was started on July 14, 1913.

The court assigned several reasons for his action in finding the issues for the defendants, but in our opinion it is only necessary for us to notice one of these. Section 28 of the Mechanics' Lien Act of 1903 provides:

> "If any money due to the laborers or sub-contractor be not paid within ten (10) days after his notice is served as provided in sections five (5), twenty-four (24), twenty-five (25) and twenty-seven (27), then such person may either file his petition and enforce his lien as hereinbefore provided for the contractor in sections nine(9) to twenty (20) inclusive, of this act, except as to the time within which suit shall be brought or he may sue the owner and contractor jointly for the amount due him in any court having jurisdiction of the amount claimed to be due, and a personal judgment may be rendered therein, as in other cases. * * *"

The plaintiffs allege in their statement of claim, and the evidence shows, that a notice of lien was served on the owner of the premises by the plaintiffs on July 10, 1913, and the present action was commenced on July 14, 1913. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxx The court held that under such circumstances the present suit was prematurely brought, and we approve of his action in that regard; but we are of the opinion, however, that the court erred in finding the issues for the defendants and in entering judgment on the finding. The mere fact that the present suit was prematurely brought would not destroy the lien of the plaintiffs, if one had been created. It is clearly apparent from an inspection of the record that the present case was not determined on its merits, and that the finding and judgment of the court were inadvertently made. When it became apparent, as it did, that the suit was prematurely brought, the court should have ordered the same dismissed without prejudice.

The judgment of the Municipal court of Chicago will therefore be reversed and the cause remanded with directions to the lower court to dismiss the plaintiffs' suit without prejudice.

REVERSED AND REMANDED WITH DIRECTIONS.

No. - 20699.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. ALBERT G. HICKLAND, Appellee, vs. CITY OF CHICAGO, et al., Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

195 I.A. 48

STATEMENT OF THE CASE. The appellee, Albert G. Hickland, filed a petition for mandamus to compel the appellants (City of Chicago, Carter H. Harrison, John L. McGeeney, Harmon G. Campbell, Elton Lower and John J. Flynn), to reinstate the petitioner to the office or position of patrolman of the police department and to certify his reinstatement as required by law.

The petition, as amended, alleged that for more than twenty years the City of Chicago has been a municipal corporation organized under an "Act to provide for the incorporation of Cities and Villages," approved April 10, 1872, in force July 1, 1872: that prior to that time it was organized under a charter or act of the legislature: that the offices of police patrolmen or policemen of the City of Chicago were created by an act of the legislature passed on February 15, 1855, which act authorized the appointment of two hundred police patrolmen or policemen to hold their office during good behavior and such further number as the city council might from time to time provide for: that on February 13, 1867, the legislature passed an act providing that the city council could increase the police force and the number of offices of patrolmen: that on May 3, 1867, August 23, 1868, and August 15, 1870, the city council, by ordinances duly passed, increased the number of offices of patrolmen: that on June 28, 1875, the city council of Chicago passed an ordinance "in and by which ordinance the city council provided that all members of the police force, including the police patrolmen or policemen, who were then in the employ of the city, should be and did from that time thenceforth constitute the patrolmen, officers

nd police force of the City of Chicago." The petition then alleges ertain dates on which the city council, "by ordinance duly passed, ncreased the number of offices of police patrolmen;" that on January 0, 1902, the city council, by ordinance duly passed, provided a classification of patrolmen of the first, second and third classes: that n February 8, 1901, the city council passed an ordinance for the appropriation of the salary of policemen: that on January 5, 1903, by a yea" and "nay" vote it duly passed an order "which provided that the uperintendent of police thereby was authorized to increase the number f police officers on the police force" to be appointed under the appropriation budget of 1901; "that said order so passed, as aforesaid, was in legal effect an ordinance of the city." The petition then alleges "that the petitioner is a police patrolman under said increases;" that from the 18th day of April, A.D. 1891, there has been an Executive Department of the City of Chicago known as the Department of Police, which Department was created by ordinance of the said City of Chicago duly passed by a two-thirds vote of the aldermen elected in said City, and by which ordinance said executive department was made to and does embrace "certain named officers, and such number of Lieutenants, Detectives, Sergeants and Police Patrolmen as have been appointed or may be prescribed by ordinance." The petition then alleges the adoption of the Civil Service Act by the City of Chicago, the appointment of Civil Service Commissioners in accordance with the provisions of said act, the classification of all offices and places of employment except those mentioned in section 11 of said act, which constitute the classified civil service of said city: that the said office of patrolman was classified by said commission and is under the Civil Service Act and constitutes part of the classified civil service: that said commission made rules to carry out the purposes of said act in accordance with its provisions: that the superintendent of police is the head of the department of police: that on October 3, 1906, the superintendent of police notified the said

commission of a vacancy in the office of patrolman and said commission certified to him the name and address of the petitioner standing highest upon the register for the class or grade to which said position belonged; that the superintendent of police appointed the petitioner in accordance with the said certification. The petition then alleges facts as to the eligibility of petitioner to take the civil service examination; that on March 7, 1908, he took the civil service examination for the office of police patrolman of the City of Chicago, which was conducted by the Civil Service Commission of that city; that he passed the examination and afterwards on, to wit: October 4, 1909, said Civil Service Commission certified him for appointment. The petition then alleges that in and by said ordinance creating the department of police, "it is provided that the Superintendent of Police with the consent of the Mayor shall appoint all officers and members of said Department of Police;" that on October 23, 1909, the superintendent of police appointed the petitioner to the office of police patrolman on probation and on that date he took the oath of office and assumed the duties of police patrolman; that on May 2, 1910, he was resworn and took the oath of office of police patrolman of the third class and entered upon his official duties as such police patrolman, under the Civil Service Act and the ordinances of said city, which office he held from thence to August 24, 1912, when he was discharged by the superintendent of police. The petition then alleges that on October 23, 1908, the Civil Service Commission certified to the comptroller of said city, the petitioner's appointment to the office of patrolman: that petitioner "was wrongfully discharged from the service of said City of Chicago and that he is still a patrolman of said City of Chicago and lawfully entitled to all the rights and privileges of such officer including the right to be paid as such officer;" "that during all the time your petitioner has been a Police Patrolman, he has never violated any of the rules prescribed by the City of Chicago for the regulation of the Police Department, nor any of the rules of the Civil Service Commission, nor any of the provisions

of the Civil Service Act;" that on July 31, 1916, the superintendent of police for and on behalf of the city preferred charges against the petitioner with the Civil Service Commission, which charges were referred to the Police Trial Board appointed by said commission to conduct the investigation of charges against police patrolmen. The petition then sets forth the charges and specifications with the names and addresses of the witnesses to be called. (These charges briefly stated are that the petitioner violated the following rules regulating the conduct of members of the Police Department: Par. 22, Sec. 1, Rule 20. Receiving or accepting any fee, reward or gift of any kind from any person whatsoever or from any friend of theirs while in custody or after discharge, or from any person for services rendered or pretended to be rendered as a member of the department. Par. 19, Sec. 1, Rule 52: Using coarse or insolent language to a citizen. Par. 19, Sec. 1, Rule 44: Conduct unbecoming a police officer or employe of the police department.) The petition then alleges that a hearing on said charges was had from time to time thereafter by the trial board: that at said hearings "no evidence was adduced other than hereinafter set forth:" that the only evidence, tending to prove the charges, that was introduced, was a certain affidavit made by Frederick W. Stults and William Kowalk, which charged the petitioner with having demanded and received from the affiants a fee or reward by way of a bribe and also the use of indecent and insolent language to them. The petition sets forth the said affidavit verbatim, the petitioner's conclusions of the evidence given by a number of witnesses at the hearings, a statement of the events which the petitioner claims really happened at the time he was accused of accepting the bribe, and a denial on the part of the petitioner of his guilt. The petition then alleges that petitioner was never at any time charged with neglect of duty or failure to perform his duties as a patrol officer that he did at all times conscientiously and faithfully perform all his duties as patrolman: that upon said hearing he made diligent effort to

secure the attendance of said Stults and Cowalk, but was unable to get them to come and testify; that on August 22, 1912, after the said hearing, said trial board reported their finding to the Civil Service Commission; that the petitioner was not present and had no opportunity to object to the findings when they were made; that said findings recited that the appellee was present in person and was represented by counsel at the hearing; that witnesses were sworn and their evidence heard by the Trial Board, "and we further find from the evidence that the said A. J. Rickland is guilty as charged in the within and foregoing charges, and that he be discharged from the Police Department and from the service of the City of Chicago. (signed) Elton Lower, James Giles." The petitioner then sets forth that upon application by him, the commission refused to give him a transcript of the evidence taken at the hearing; that upon said hearing he did not employ a stenographer and therefore cannot attach a complete copy of the evidence heard upon said trial; that a petition for rehearing has been denied by the Civil Service Commission; that afterwards, on August 24, 1912, the findings were reported to the superintendent of police of the City of Chicago by said commission and thereupon the petitioner was discharged from the service of said city. The petition then alleges that "inasmuch as no evidence was heard by the said Police Trial Board upon the hearings of his (petitioner's) cause in support of said charges," "that the acts of said Civil Service Commission in finding your petitioner guilty of said charges preferred and recommending his discharge from the police department were illegal and void" and prays a writ of mandamus commanding the Civil Service Commission and the City of Chicago to forthwith reinstate the petitioner as a police officer of said city in the employment of said city with the rank of patrolman. The petition has attached thereto and made a part thereof by reference an affidavit of the said Frederick W. Stults, in which affiant sets forth the events which occurred at the time the petitioner was accused of accepting a bribe and denies the giving of a bribe. The trial court overruled the general demurrer of the

respondents (appellants) to the amended petition, and the respondents electing to stand by their demurrer, it was ordered that a writ of mandamus issue as prayed and judgment for costs was rendered against the respondents (appellants). The appellee has not filed an appearance or brief in this case.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The appellants contend that the court erred in overruling the demurrer of the respondents (appellants) to the amended petition and in entering judgment for the petitioner, and the following reasons are assigned in support of this contention: "1. The petition did not set forth facts which show the legal existence of the office or position of police patrolman nor the legal right of the petitioner to hold it; 2. The petition shows that the Civil Service Commission had jurisdiction and proceeded in conformity with the requirements of the Civil Service Act." After a careful examination of the record in this case, we are satisfied that the contention of the appellants is meritorious for both of the reasons assigned.

It is not necessary to cite authorities in support of the well known rule that a writ of mandamus should not be issued in any case unless the party applying for the writ shows a clear right to it and a clear legal duty on the part of the respondent, or respondents, to perform the act sought to be enforced.

The petitioner has failed to properly plead any ordinance creating the office or position of police patrolman. State courts of general jurisdiction will not take judicial notice of municipal ordinances. They must be pleaded and proved. This general rule is applicable to a case like the present one, as there is now no statute in force, creating the office of police patrolman, (Grech v. City of Chicago, 280 Ill. 581) and the right of the appellee to relief must be predicated upon an ordinance creating the said office, and the same - if there

one - should have been specially pleaded. Stott v. City of Chicago, Ill. 291. "The office of policeman or police patrolman was unknown the common law, and wherever such office exists it is the creation f the statute law or municipal ordinance." Sullis v. City, 273 Ill. 72. The allegations in the petition, so far as they relate to any lleged ordinance creating the office or position of police patrolman, re mere conclusions of the pleader and not statements of facts from hich the court can determine whether or not the position was created y ordinance. The allegations that the petitioner (appellee) was tried y the Civil Service Board under the title of police patrolman and that ppropriations for his salary as police patrolman were made by the City ouncil merely tend to show that he was an officer de facto. In a proeeding like the present one it is necessary for the petitioner to llege in his petition the legal existence of the office of police patrolman and his legal right to hold it - to allege that he is an officer e jure as well as de facto. Stott v. City of Chicago, supra; Scheill . City, 212 Ill. 481; Moon v. Sayer, 216 Ill. 40; Sullis v. City, upra.

As we have heretofore said, it has been definitely determined y our Supreme Court that there is now in force no statute creating the ffice of police patrolman, and that a suit of this kind cannot be maintained without an ordinance creating the office. (Gerach v. City of hicago, 290 Ill. 551.) The following language in that case probably xplains why the appellee did not follow the present appeal: "Not only loes the petition fail to allege any ordinance creating such office, but ounsel states in his brief that there is no such ordinance, and that herefore it follows that if the court adheres to its former decisions here are no policemen, either de jure or de facto, in the City of hicago. This may be true, and it may be true that there is a defect in the law in regard to the method authorized by the Cities and Villages ct of creating offices and filling them, and an inconsistency, because f such defect, between that act and the Civil Service act. If so, it

is the province of the legislature and not the court to correct such defect or inconsistency."

The appellants contend that "in any case where the petition does not set forth facts showing that the Civil Service Commission did not have jurisdiction and did not proceed according to the requirements of the Civil Service Act." The only allegations in the petition that attack the lawfulness of the proceedings by the Civil Service Board, are: first, there was no evidence to support the finding: second, that the petitioner was not present when the finding was made by the Trial Board, and had no opportunity to object to the same. It is apparent from the petition that the Civil Service Board had jurisdiction of the person of the petitioner and of the subject matter, and there are no facts stated which show that the proceedings were not carried on in accordance with the Civil Service Law. The allegations that the evidence heard by the Trial Board did not justify the finding of guilty are immaterial in determining the sufficiency of the petition. People ex rel Miller v. City of Chicago, 210 Ill. 111. The appellee alleges that he was not present when the finding was made by the Trial Board; non constat, his absence may have been of his own choosing. In any event there is nothing in the law that required the presence of the appellee at the time that the finding was made by the Trial Board. In the present case, therefore, even if the petitioner had properly alleged in his petition an ordinance creating the office or position of police patrolman, there are no facts stated in his petition that show that the action of the Civil Service Board in discharging him was not warranted under the law.

For the foregoing reasons the judgment of the Circuit Court of Cook County will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

434 - 20733.

NORTH WEST STATE BANK, a Corporation,
Appellee,

vs.

JACOB ALTER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

1931 I.A. 50

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This was an action of the first class in the Municipal Court of Chicago, brought by the appellee (hereinafter called the plaintiff) against the appellant (hereinafter called the defendant), to recover on a certain promissory note in the principal sum of $1172.06, with interest thereon at six per cent. per annum, executed by the defendant and made payable to one Alfred Anderson. The case was tried before the court and a jury, and at the close of all the evidence the court directed a verdict in favor of the plaintiff for $1231.56. Judgment was entered on the verdict, and this appeal followed.

The evidence shows that one Alfred Anderson, a depositor at the plaintiff bank, had from time to time certain business transactions with the defendant, and that on various occasions he took notes of the defendant in settlement of the same. These notes, he, from time to time, discounted with the plaintiff and prior to the transaction in question, the notes were always paid by the defendant as they matured. On February 15, 1918, the defendant executed and delivered to the said Anderson his promissory note - the one on which the present suit is brought. Anderson discounted this note with the plaintiff, and his checking account was credited with the proceeds of the same. This note was not given to the bank by Anderson in payment of a debt. A transcript of the bank's books, showing Anderson's checking account from the date this note was discounted, to and including the date that the present suit was commenced, was introduced at the trial, and it appears that Anderson's checking

account was an active one: that between the said dates numerous deposits were made and many checks were drawn against the account: that his total balance, after receiving credit for the note in question on the date it was deposited, was $1720.45, and that between the date of the discount of the note and the date of the maturity of the same, Anderson drew checks against his account aggregating more than $7,000. On the date of the maturity of the note Anderson had on deposit in the bank a sum greater than the amount due on the note. When the note fell due the defendant refused to pay it, and this suit followed.

In his affidavit of merits, the defendant alleged that he had a complete defense to the said note against the said Anderson, in that the said note was given to the said Anderson without any consideration, and that the plaintiff was not a bona fide holder of the same for value.

The defendant contends that the plaintiff, at the time of the maturity of the note, had sufficient funds on deposit in the checking account of Anderson to cover the amount due on the note, and that it therefore had the right under the law to charge the amount due on the note to the said account, and that it was its duty to do so, and that not having done so, it cannot now claim that it is an innocent holder of the note for value, and that under the facts proven in the case, the court erred in excluding testimony bearing on the contention of the defendant that the note was given to Anderson by the defendant without any consideration.

The question for us to determine is: Was it the duty of the bank, under the facts of this case, to charge the amount of the note to Anderson's account on the day that it fell due? The defendant cites in support of its contention that it was the duty of the bank to do so, the case of Warman v. First National Bank, 185 Ill. 80. In that case the court held that a bank does not become an innocent purchaser of a negotiable note so as to entitle it to

protection against infirmities of the paper by merely discounting the same for a person not indebted to it and crediting him with the proceeds by way of deposit, as such deposit, so long as it is not withdrawn, is subject to equities of prior parties; but the court also held in that case that the introduction in evidence, by the plaintiff, of the notes sued upon, endorsed in blank by the payee, is prima facie evidence that the plaintiff has acquired them in good faith, for value, in the usual course of business, before maturity and without notice of defenses; and such proof cannot be overcome by showing merely that the original transaction between the plaintiff and the payee did not, of itself, amount to a purchase of the notes; and that the defendants to a suit on a note, brought by an endorsee bank, in order to sustain their claim that the bank is not entitled to protection as an innocent purchaser, must show, not only that the bank merely credited the proceeds of the discounted note by way of deposit in favor of the payee and that the payee was not then indebted to the bank, but must also prove that the amount due upon such deposit, if any, had not been drawn out at the time of the trial, there being no claim of an earlier notice to the bank of such defense. Clearly the defendant in the present case has not brought himself within the rule announced in that case, as the evidence shows that the proceeds of the discounted note were checked out by Anderson before the maturity of the note in question.

The defendant further contends that the court erred in excluding certain book entries made by the bank subsequent to the bringing of this suit. We have carefully considered this contention, and we find it without the slightest merit.

The judgment of the Municipal Court of Chicago will be affirmed.

Affirmed.

447 - 50779.

PEOPLE, ex rel. L. FRANK LYDSTON, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
HAGLEY HOYNE, State's Attorney, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The appellee filed a petition in the Circuit court of Cook county, seeking to compel the appellant, by mandamus, to sign a petition as State's Attorney, for leave to file an information in the nature of a quo warranto. The petition alleged, in substance, that certain persons, therein named, were unlawfully elected and acting as trustees for the American Medical Association, an Illinois corporation, not for profit. A general demurrer to the petition, interposed by the appellant, was sustained by the Circuit court, whereupon the appellee elected to stand by his petition and appealed to this court. This court (People, ex rel. Lydston v. Hoyne, State's Attorney, 1[illegible] Ill. App. 4[illegible]), held that the Circuit court erred in sustaining the demurrer to the petition for mandamus and reversed the judgment of that court and remanded the cause. Thereafter, this court, by stipulation of the parties, set aside the judgment it had entered, overruled the demurrer and entered a final judgment awarding a peremptory writ of mandamus, commanding the appellant, the State's Attorney of Cook county, to sign the said information in accordance with the prayer of the petition. Thereafter an appeal was taken to the Supreme court and that court (People, ex rel. Lydston v. Hoyne, 3[illegible] Ill. 9[illegible]), held that this court had no jurisdiction - notwithstanding the stipulation of the parties - to enter a judgment overruling the demurrer and awarding the writ, and the judgment of this court was reversed and the cause remanded to this court with directions to enter a judgment in accordance with the one originally entered by this court. Thereafter this court remanded the cause to

the Circuit court and thereafter that court, in obedience to the judgment of this court, overruled appellant's demurrer. The latter elected to stand by his demurrer, and a final judgment was entered awarding a peremptory writ of mandamus commanding the appellant to sign the information in accordance with the prayer of the petition for mandamus. This appeal followed.

The appellee has moved this court to affirm the judgment in this case, for the reason that this court has previously decided (People, ex rel. Lydston v. Hoyne, State's Attorney, supra.) the only issue now presented upon this appeal, and the former decision of this court on that question is conclusive upon the parties upon this appeal. This motion must prevail. The present appeal presents the same suit, with the same parties thereto, as the former one, and the only question involved in this appeal was passed upon and decided by us in the former appeal. That adjudication is conclusive upon the parties upon this appeal. Aydt v. Douglas, et al., 148 Ill. 164, and cases cited therein.

The appellant contends that the parties are not bound by the former decision of this court, for the following reasons:

> "First:- The issue involved herein is one of law and the court is not bound by its former decision for that reason.
> Second:- The authority cited in the cases involved wherein an appellate tribunal is bound by its former decision, refer to an issue of fact where there has been a decision on the merits.
> Third:- In the court's former decision Mr. Justice McCurdy dissented and therefore the court should re-consider its majority opinion."

No authorities are cited in support of this contention, and plainly there is no merit in it.

The judgment of the Circuit court of Cook county will be affirmed.

Affirmed.

455 - 20787.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT OF CHICAGO.
DON HOLTZMAN, Plaintiff in Error.	)	

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

On June 26, 1914, an information was filed in the Municipal court of Chicago, in which it was charged that the plaintiff in error, Don Holtzman, hereinafter called the defendant, "on the 23rd day of March, A.D. 1914, at the City of Chicago, aforesaid, did knowingly and fraudulently make a false representation in writing signed by him concerning his respectability, wealth, mercantile correspondence and connections, assets and liabilities and fraudulently obtained thereon credit and divers sums of money, to-wit: Eleven Hundred ($1,100.00) Dollars from the Michigan Avenue Trust Company, a corporation, contrary to the form of the Statute," etc. The information was founded upon Section 87 of the Criminal Code, which reads as follows:

"Whoever, by any false representation in writing, signed by him, of the respectability, wealth, mercantile correspondence or connections, or assets or liabilities of himself or of any firm of which he is a member, or whoever, being an officer of a corporation, by any false representation in writing, known by him to be false and signed by him, of the respectability, wealth, mercantile correspondence or connections, or the assets or liabilities, or any or all of them, of such corporation, obtains credit for himself, for such firm or for such corporation, and thereby defrauds any person of money, goods, chattels, or any valuable thing, or whoever procures another to make a false report in writing, signed by the person making the same, of the honesty, wealth, mercantile correspondence or connections, or assets or liabilities of himself, or of any firm of which he is a member, or whoever, being an officer of a corporation, procures another to make a false report in writing, known by him to be false, signed by the person making the same, of the honesty, wealth, mercantile correspondence or connections, or assets or liabilities of such corporation, and thus obtains credit for himself, for such firm or for such corporation, and thereby defrauds any person of any money, goods, chattels or other valuable thing, shall be sentenced to return the money or property so fraudulently obtained, if it can be done, and shall be fined not exceeding $2,000 and confined in the county jail not exceeding one year."

The case was tried before the court and a jury and a verdict was returned finding the defendant guilty. Judgment was entered on the verdict and the defendant was sentenced to confinement in the county jail for a period of thirty days and to pay a fine of $500.

The uncontradicted facts in the case are that the defendant, on March 25, 1914, went to the Michigan Avenue Trust Company in Chicago for the purpose of obtaining a loan of money from the said bank; that the cashier of the bank, after the defendant had made his request for a loan, asked the defendant to furnish the bank a statement in writing of his assets and liabilities, and the defendant was handed by the said official a blank statement to fill out and sign; that the defendant took the blank statement home with him and there filled out and signed the same; that on the following day he went to the bank and handed to one of its officials the said statement and that he then received from the bank a loan of $600 in cash; that the said statement showed but one item of liability, viz: "bills payable to banks, $400;" that at the time that the defendant signed the said statement, he was indebted to one Schmidt in the sum of $400, which indebtedness was evidenced by a judgment note signed by the defendant, and that he was also indebted to the State Bank of Italy in the sum of $500, which indebtedness was evidenced by a note signed by the defendant and given to his son, and which had been discounted by the latter at the ~~State of Illinois~~ last mentioned bank. The defendant testified that when he signed the statement he had forgotten that he owed the Joseph Schmidt note, and as to his failure ~~to mention~~ to mention the note held by the State Bank of Italy he testified as follows: "No, I did not owe them the money; my son did, and he went broke * * * Well, if my son would not pay, I owe; I got to pay; I want to patronize my son; I give him paper and if he won't pay I have to pay. My name was signed to a note that was discounted or in possession of the State Bank of Italy; that note was given for accommodation: by accommodation I mean that is for my son. At that time I signed the note I

don't feel nothing: I don't feel because I think my son will pay. * * * If he didn't pay I had to pay because I signed my name."

The main contention of the defendant is that the criminal intent, essential to the offense charged, was not proven beyond a reasonable doubt, and our attention is particularly called to the testimony of the defendant bearing upon this question. The jury, in passing upon the question of the intent of the defendant, were not bound to accept the testimony of the defendant in reference thereto, but in determining the said question they had the right to consider all the facts and circumstances connected with the case. It is very clear that a prima facie case was established against the defendant, and in the absence of errors of law, this court has no right to set aside the verdict of the jury, unless it clearly appears from a consideration of all the evidence that there is a reasonable doubt of the defendant's guilt. It would serve no useful purpose for us to enter upon an analysis of the evidence in this case. We have examined the same with care, and we have reached the conclusion that we cannot say that the defendant has not had a fair trial and that the verdict of the jury is not justified by the proof. The judgment of the Municipal Court of Chicago will therefore be affirmed.

AFFIRMED.

20737

478 - 20737

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
[illegible], Plaintiff in error.	)	OF CHICAGO.

195 I.A. 53

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

In the opinion heretofore filed by us affirming the judgment of the trial court, we said:

"On June 23, 1914, an information was filed in the Municipal court of Chicago, in which it was charged that the plaintiff in error, Ben Holtzman, hereinafter called the defendant, 'on the 23rd day of March, A. D. 1914, at the City of Chicago, aforesaid, did knowingly and fraudulently make a false representation in writing signed by him concerning his respectability, wealth, mercantile correspondence and connections, assets and liabilities and fraudulently obtained thereon credit and divers sums of money, to-wit: Eleven Hundred ($1,100.00) Dollars from the Michigan Avenue Trust Company, a corporation, contrary to the form of the Statute,' etc. The information was founded upon Section 92 of the Criminal Code, which reads as follows:

> 'Whoever, by any false representation in writing, signed by him, of the respectability, wealth, mercantile correspondence or connections, or assets or liabilities of himself or of any firm of which he is a member, or whoever, being an officer of a corporation, by any false representation in writing, known by him to be false and signed by him, of the respectability, wealth, mercantile correspondence or connections, or the assets or liabilities, or any or all of them, of such corporation, obtains credit for himself, for such firm or for such corporation, and thereby defrauds any person of money, goods, chattels, or any valuable thing, or whoever procures another to make a false report in writing, signed by the person making the same, of the honesty, wealth, mercantile correspondence or connections, or assets or liabilities of himself, or of any firm of which he is a member, or whoever, being an officer of a corporation, procures another to make a false report in writing, known by him to be false, signed by the person making the same, of the honesty, wealth, mercantile correspondence or connections, or assets or liabilities of such corporation, and thus obtains credit for himself, for such firm or for such corporation, and

thereby defrauds any person of any money, goods, chattels or other valuable thing, shall be sentenced to return the money or property so fraudulently obtained, if it can be done, and shall be fined not exceeding $2,000 and confined in the county jail not exceeding one year.'

The case was tried before the court and a jury and a verdict was returned finding the defendant guilty. Judgment was entered on the verdict and the defendant was sentenced to confinement in the county jail for a period of thirty days and to pay a fine of $500.

The uncontradicted facts in the case are that the defendant, on March 23, 1914, went to the Michigan Avenue Trust Company in Chicago for the purpose of obtaining a loan of money from the said bank: that the cashier of the bank, after the defendant had made his request for a loan, asked the defendant to furnish the bank a statement in writing of his assets and liabilities, and the defendant was handed by the said official a blank statement to fill out and sign: that the defendant took the blank statement home with him and there filled out and signed the same: that on the following day he went to the bank and handed to one of its officials the said statement and that he then received from the bank a loan of $800 in cash: that the said statement showed but one item of liability, viz: 'bills payable to banks, $600;' that at the time that the defendant signed the said statement, he was indebted to one Schmidt in the sum of $400, which indebtedness was evidenced by a judgment note signed by the defendant, and that he was also indebted to the State Bank of Italy in the sum of $500, which indebtedness was evidenced by a note signed by the defendant and given to his son, and which had been discounted by the latter at the last mentioned bank. The defendant testified that when he signed the statement he had forgotten that he owed the Joseph Schmidt note, and as to his failure to mention the note held by the State Bank of Italy he testified as follows: 'No, I did not owe them the money; my son did, and he went broke . . . Well, if my son would not pay, I owe; I got to pay: I want to patronize my son: I give him paper and if he won't pay I have to pay. My name

was signed to a note that was discounted or in possession of the State Bank of Italy; that note was given for accommodation: by accommodation I mean that is for my son. At that time I signed the note I don't feel nothing; I don't feel because I think my son will pay. * * * If he didn't pay I had to pay because I signed my name.'

The main contention of the defendant is that the criminal intent, essential to the offense charged, was not proven beyond a reasonable doubt, and our attention is particularly called to the testimony of the defendant bearing upon this question. The jury, in passing upon the question of the intent of the defendant, were not bound to accept the testimony of the defendant in reference thereto, but in determining the said question they had the right to consider all the facts and circumstances connected with the case. It is very clear that a prima facie case was established against the defendant, and in the absence of errors of law, this court has no right to set aside the verdict of the jury, unless it clearly appears from a consideration of all the evidence that there is a reasonable doubt of the defendant's guilt. It would serve no useful purpose for us to enter upon an analysis of the evidence in this case. We have examined the same with care, and we have reached the conclusion that we cannot say that the defendant has not had a fair trial and that the verdict of the jury is not justified by the proof. The judgment of the Municipal Court of Chicago will therefore be affirmed."

Since the granting of the petition for a rehearing in this case, we have carefully reconsidered all the questions passed upon in the aforesaid opinion, and we adhere to the conclusions therein expressed as to the same.

The petition for a rehearing was granted by us solely because of the contention, raised for the first time on the petition for rehearing, and very earnestly argued, that the information in this case is fatally defective. Such a point, of course, can be raised

for the first time on a petition for rehearing.

The defendant contends that the information is fatally defective, because (as defendant insists) it fails to allege that the Michigan Avenue Trust Company was defrauded by means of the said false representation in writing.

Section 3, Division 11, of the Criminal Code, (Hurd's Revised Statutes, 1914, p. 338) provides: "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." An indictment or information is sufficient if the defendant is notified thereby of the charge which he is to meet, so that he may make his defense, and may, if he is convicted or acquitted of the same, be able to plead former jeopardy to another charge for the same offense. It is not necessary in an indictment or information to use the very words of the statute creating the offense; it is sufficient if the words used convey the same meaning. People v. St. Clair, 244 Ill. 444; People v. Waltyn, 191 Ill. App. 88. "In many cases, however, the use of words equivalent to statutory words is sufficient, or words which are of more extensive signification than or inclusive of the statutory terms, or which are of similar import or of the same meaning in their common acceptation, or which substantially follow the statutory words and state them with substantial accuracy and certainty to a reasonable intendment." 22 Cyc. 361.

No motion was made by the defendant to quash the information, and it is clearly apparent from a reading of this record that the defendant fully understood the nature of the charge made against him in the information. It may be conceded that the information is somewhat defective in the particular complained of, but the only question for us to decide is, is it sufficient to support the judgment in this case? Or, to put it in another way, is the information

fatally defective? The information charges that the defendant "fraudulently obtained thereon credit and divers sums of money, to-wit: Eleven Hundred ($1100.00) Dollars from the Michigan Avenue Trust Company." It is a familiar principle of pleading that whatever is included in or necessarily implied from an express allegation, need not be otherwise averred. Baysinger v. The People, 11[illegible] Ill. 419. We think that there is embraced in this averment what is equivalent, in legal effect, to a direct charge that the said Trust Company was defrauded by means of the said false representation. The following cases sustain the conclusion we have reached that the information in the present case in the particular complained of is not fatally defective. People v. Weber, 1[illegible] Ill. App. 10[illegible]; U. S. v. Bayaud, 1[illegible] Fed. 87[illegible]; State v. McDonkey, [illegible] Ia. 4[illegible]; State v. Penley, 27 Conn. 5[illegible]. The judgment of the Municipal Court of Chicago will therefore be affirmed.

AFFIRMED.

400 - 20790.

LOUIS BUENDERT, Plaintiff in Error,	)	
vs.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.
CHARLES BOSTROM and HENRY E. STRASSHEIM and ADOLPH E. HOERICKE, doing business as HENRY E. STRASSHEIM & COMPANY, Defendants in Error.	)	

195 I.A. 55

STATEMENT OF THE CASE. Louis Buendert, plaintiff in error, hereinafter called the plaintiff, sued Charles Bostrom and Henry E. Strassheim and Adolph E. Hoericke, doing business as Henry E. Strassheim & Company, defendants in error, hereinafter called the defendants, in an action of the fourth class in the Municipal Court of Chicago. The plaintiff's original statement of claim and the first and second more specific statements of claim, having been stricken from the files on motion of the defendants, the plaintiff, pursuant to the order of the court, filed his third more specific statement of claim, which is as follows:

"Plaintiff's claim is for two hundred ($200) dollars, said amount having been fraudulently obtained from the plaintiff by the defendants herein on or about the 12th day of November, 1913.

Plaintiff further states that on, to wit: the 12th day of November, 1913, the plaintiff signed a certain agreement which said agreement was also signed by Charles Bostrom, one of the defendants herein, a copy of said agreement being as follows:

'I, the undersigned, Charles Bostrom, do hereby agree to sell to Louis Buendert, the property, Lot One (1) in Subdivision of Lot Eighty-nine (89), in Edgewater Park: a subdivision in the Northwest Quarter (N.W. 1/4) of the Northwest quarter (N.W. 1/4), Section Five (5), Township Forty (40) North, Range Fourteen (14). Also that part of the east Seventeen feet (e. 17 ft.) of Lot Ninety (90), lying directly West of the above mentioned Lot One (1), together with all improvements thereon, and, known as 6246 Perry St.

'Subject, to 1913 taxes and special assessments and an incumbrance of Two Thousand Seven Hundred Fifty ($2,750) Dollars, with interest at 5 1/2%, due July 14, 1915, which the purchaser agrees to assume.

'The balance of the purchase money, Twenty-six Hundred Fifty ($2650) Dollars to be paid as follows: Six Hundred Fifty ($650) Dollars cash upon the execution of the agreement and the balance of Two Thousand ($2,000) Dollars, to be paid in installments of Thirty-five ($35) Dollars per month, with interest at six per cent.

'The purchaser agrees to pay for the unexpired time on the Insurance Policy of Thirty-five Hundred ($3500) Dollars, pro rata.

'The contract to be executed and signed on or before the twelfth day of November, 1913, abstract to be furnished, drawn down to date.

'Accepted:

'Nov. 8th, Chas. Nostrom

'Louis Suendert.'

Plaintiff further states that said agreement is an agreement for the purchase of certain real estate in the City of Chicago, County of Cook and State of Illinois: that the defendants, Henry E. Strassheim and Adolph Doericke, doing business as Henry E. Strassheim & Co., were the agents of the defendant, Charles Nostrom, in the sale of the property, known as 6246 Perry street, referred to in the above mentioned agreement, that previous to the signing of said agreement the said defendant, Charles Nostrom, by his agents, Henry E. Strassheim & Co., took the said plaintiff herein out to the premises known as 6246 Perry street and there showed him the said premises and represented to him that the dimensions of said premises were 46x76 feet: that later on the said defendants herein prepared the agreement above set forth and presented it to plaintiff to sign; that at the time of the signing of said agreement the defendants represented to the plaintiff herein that the description therein covered and embraced all of the premises known as 6246 Perry street, in the City of Chicago, the dimensions of same being 46x76 feet.

Plaintiff further states that since the signing of said agreement the said plaintiff has learned that the description in said agreement does not include all of the premises known as 6246 Perry street, that said premises include Lot one (1) in a subdivision of Lot eighty-nine (89) in Edgewater Park, a subdivision of the Northwest quarter (N.W. 1/4) of the Northwest quarter (N.W. 1/4) of Section five (5), Township forty (40) North, Range fourteen (14), and it also further includes the east twenty (E. 20) feet of Lot Ninety (90), lying directly west of the above mentioned Lot one (1) instead of the east seventeen (E. 17) feet of said Lot ninety (90) as described in said agreement. The description in said agreement does not cover the rear three (3) feet of the premises known as 6246 Perry street. Plaintiff further states that the said rear three (3) feet comprise a considerable and material part of said premises and without the said three (3) feet the premises would be much less in value; and that the property covered by the legal description in said agreement is only 43x76 feet instead of 46x76; and plaintiff further states that all of the premises known as 6246 Perry street are 46x76 feet in dimensions.

Plaintiff further states that the defendant, Charles Nostrom, and his agents, knowing that the said description in said agreement did not cover all of the premises known as 6246 Perry street, yet nevertheless they purposely and fraudulently represented to the said plaintiff at the time of the signing of the said agreement that the description therein covered and embraced all of the premises known as 6246 Perry street and that the said plaintiff relied on their said representations that the premises described therein contained all of the premises known as 6246 Perry street: and the defendants herein knew that the said plaintiff was relying on their said statements; and plaintiff further states that he signed said agreement and paid over two hundred ($200) dollars to the defendants, relying on their said representations as being true: and that the defendants herein knew that the plaintiff herein was relying on said statements and they knew that he signed said agreement and paid over the said two hundred ($200) dollars relying upon their said representations as being true. Plaintiff further states that if he had

known that the representations above made were false he would not have signed said agreement nor paid over the said two hundred ($200) dollars.

Plaintiff further states that upon learning that the property described in said agreement did not contain the whole of the premises known as 3245 Perry street he notified the defendants that he was unwilling to be bound by said agreement and that he cancelled the same and demanded the return of the two hundred ($200) dollars paid at the signing of said agreement, that the defendants have refused to accept the cancellation of said contract or return the said two hundred ($200) dollars.

Louis Buendert."

To this statement was attached an affidavit of claim. On motion of the defendants this last mentioned statement of claim was ordered stricken from the files and the suit was dismissed at the plaintiff's costs. This writ of error followed.

MR. PRESIDING JUSTICE SCHALEY delivered the opinion of the court.

The defendant argues, in support of the action of the trial court in sustaining the defendants' motion to strike this statement of claim from the files and in dismissing the suit and in entering judgment for costs in favor of the defendants, "that the statement of claim on its face shows that the plaintiff is seeking to vary the terms of a written contract and to set aside and annul a valid and enforceable contract by making allegations of fraud and deceit as to the representations made prior to the signing of the contract concerning the dimensions of the property, which is fully and particularly described in the contract itself. * * * As it appears from the statement of claim that plaintiff is relying upon representations which would change the terms of the contract with respect to the description of the property, such action could not be maintained by law."

The plaintiff contends that he is not suing upon the contract, nor is he attempting to obtain equitable relief of any kind: that his action is brought for fraud and deceit.

We are satisfied that the plaintiff is right in his contention as to the nature of the claim set forth in the said statement. The plaintiff in the said statement is not seeking to obtain equitable relief in a court of law, nor is he suing to recover upon the contract

between the parties; and while his claim is certainly defectively stated, it is, nevertheless, in its nature, one for fraud and deceit. From the arguments of counsel on both sides of this case, it appears that the action of the trial court in striking the third more specific statement from the files, and in dismissing the suit, and in entering judgment against the plaintiff for costs, was predicated upon the theory that the claim of the plaintiff was, in its nature, as contended for by the defendants.

The judgment of the Municipal Court of Chicago will be reversed and the cause remanded for further proceedings not inconsistent with the views expressed in this opinion.

REVERSED AND REMANDED.

439 - 20801.

FREDERICK FLECK, Administrator, appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
JOSEPH WEIPERT, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE DUNN delivered the opinion of the court.

This suit was brought by the appellee, hereinafter called the plaintiff, against the appellant, hereinafter called the defendant, to recover the proceeds of a sale of a certain saloon business located at 628 Wells street, Chicago. The suit is brought by the plaintiff as administrator de bonis non of the estate of Marie Weipert, deceased. The defendant was the reputed husband of said Marie Weipert, and they lived together as husband and wife for a number of years, and upon the death of the said Marie Weipert, October 7, 1912, the defendant "as surviving husband of the deceased" was appointed administrator of her estate. The defendant operated a saloon and restaurant at 628 Wells street, Chicago; also a saloon at Lincoln and Wrightwood avenues, Chicago. The defendant resigned as administratrix of the estate of said Marie Weipert, deceased, November 27, 1912, and the plaintiff, a brother of the deceased, was appointed administrator de bonis non of said estate on December 2, 1912. During the time that the defendant was acting as administrator of the said estate, he sold the business at 628 Wells street for $4200. The plaintiff's theory of the evidence is that Marie Weipert married the defendant and that at the time of the said marriage she, in good faith, believed that the defendant was a single man and that some time after the said marriage she discovered that the defendant had a wife living at the time of his marriage to her, (Marie Weipert), and that she was still living and undivorced from the defendant, and that a few hours prior to the death of Marie Weipert, she, the said Marie Weipert, entered into an agreement with the defendant that they should separate and not live together any more as husband and wife, and that thereupon it was also agreed between the said parties that the

defendant was to take the saloon at Lincoln and Wrightwood avenues, and the deceased was to take the place of business at 325 Wells street. It is also claimed by the plaintiff that Marie Weipert had an interest in the property in question. Within an hour after the alleged agreement was made, Marie Weipert, with suicidal intent, took a dose of carbolic acid and died from the effects of the same an hour or two thereafter. The claim of the defendant is that the property in question belonged to him and that the said Marie Weipert had no interest in the same and that no such agreement as is claimed by the plaintiff was made between Marie Weipert and the defendant, and further, that the defendant did not sell or give the said property to Marie Weipert. The declaration alleged, in substance, that the defendant, administrator, took possession of all the goods, chattels and personal estate of the deceased; that during the time the defendant was acting as administrator of said estate he sold a large amount of goods and chattels belonging to said estate and received therefor the sum of $4,000, and converted the remainder of said goods and chattels to his own use, and refuses to surrender said goods and chattels to the plaintiff, or to account to the plaintiff for the proceeds of said sale, to the damage of the plaintiff in the sum of $3000. The declaration also contained the common counts. The case was tried before the court and a jury, and the issues were found for the plaintiff and the damages were assessed at $4,200. Judgment was entered on the finding and this appeal followed.

The defendant strenuously insists that on the merits of the case he was entitled to a verdict. We are satisfied, after a careful examination of the evidence, that the case, on the facts, is one in which the defendant has a right to demand that the record be free from substantial errors of law.

The court gave to the jury at the request of the plaintiff the following instruction:

> "The jury are instructed that one mode of impeaching a witness is by showing that the witness has made different and contradictory statements on the same points on former occasions. If it appears from the evidence in this case that either of the witnesses has been impeached in this manner, the jury have a right to

take into consideration such impeachment in determining the value of the testimony of such witness or witnesses. And if the jury believe that the statements made out of court by such witness or witnesses, if they believe from the evidence any such statements have been made, were the truth, then they have a right to consider such statements, in weighing the evidence, where they are contradictory of the statements of such witness or witnesses upon the stand."

This instruction is clearly bad. By it, the jury are told, in effect, that a witness could be impeached as to an immaterial matter in his testimony in reference to which he had made different and contradictory statements on former occasions. It is also open to the criticism that a jury might understand from it that a witness is impeached (a situation that would authorize the jury to disregard the entire uncorroborated testimony of the witness), where it is shown that he "has made different and contradictory statements on the same points on former occasions." Proof of such statements, if they concern material matters in the witness's testimony, is merely evidence tending to impeach the witness, and the jury should consider these facts in estimating the weight which ought to be given to his testimony, but a witness is not successfully impeached by mere proof that he "has made different and contradictory statements on the same points on former occasions." If a jury believes that a witness has wilfully sworn falsely to a material matter, or that he has been successfully impeached, they may disregard his entire uncorroborated testimony - otherwise not.

The court gave to the jury at the instance of the plaintiff the following instruction:

"You are further instructed that if you believe from the evidence that Marie Weipert and the defendant Joseph Weipert were married, and that said Marie Weipert married said Joseph Weipert in good faith, and that at the time of such marriage, if you believe from the evidence there was such a marriage, the said Joseph Weipert had another wife living, and if you also believe from the evidence that after such marriage, if there was such a marriage, the said Marie learned that said Joseph Weipert had another wife living, and that thereafter the said Joseph and Marie Weipert agreed to separate, then such an agreement to separate, if you believe from the evidence in this case there was such an agreement, would be a sufficient consideration to support a transfer of property from said Joseph Weipert to said Marie Weipert, or to support an agreement to transfer property from him to her."

The plaintiff states that this instruction is to the effect "that if Mrs. Seipert married appellant in good faith and afterwards learned that he had another wife living, and then she and appellant agreed to separate, such agreement was a sufficient consideration to support a transfer of the right to the property." We do not think that this instruction correctly states the law. The vice of this instruction is that it makes the mere alleged agreement of Marie Seipert and the defendant to separate a sufficient consideration for a transfer of the property in question from the defendant to Marie Seipert or to support an agreement to transfer said property from him to her. Under the facts assumed in this instruction it was the legal duty of Marie Seipert and the defendant to cease living in adultery, and yet by this instruction the jury are told that if she and the defendant agreed to separate, then such an agreement, alone, would be a sufficient consideration to support the transfer of the property in question. The mere agreement to separate called upon Marie Seipert to do nothing more than the law demanded of her, and it did not extinguish any claim or right she might have had against the defendant. If, at the time of the agreement to separate, she had any right of action against the defendant on account of any alleged fraud or deceit in the matter of her alleged marriage to him, or if the defendant was at that time under the law obligated to support her, or if she had any lawful claim upon the property in question, these claims or rights would still exist after the making of the said agreement. We think the giving of the two instructions above referred to were prejudicial to the defendant.

The defendant has assigned many other alleged errors, and while we are of the opinion that some of these are meritorious, we do not consider it necessary to specifically refer to them, for the reason that the matters complained of are not likely to happen upon a new trial.

The judgment of the Circuit Court of Cook County will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

516 - 20849.

THOMAS KENNADY, a minor, by his next friend, PETER KOSMIN, Appellee, vs. CITY OF CHICAGO, Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

195 I.A. 58

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This was an action on the case, brought in the Superior Court of Cook County by the appellee, hereinafter called the plaintiff, against the appellant, hereinafter called the defendant, to recover damages alleged to have been sustained by the plaintiff by reason of a certain accident to the plaintiff on August 28, 1905. The accident occurred at a point where Larrabee Street crosses the Chicago, Milwaukee & St. Paul Railroad tracks in the City of Chicago. The plaintiff, a boy nine years old, was run over by a train passing along said tracks, and one of his legs was so badly injured that it became necessary to amputate the same.

The case was tried before the court and a jury, and a verdict was returned finding the defendant guilty and assessing the plaintiff's damages at $7500. Upon the plaintiff's entering a remititur for $2500, the court entered judgment for $5,000, and this appeal followed.

The declaration consisted of three counts. Each count alleged the wrongful and negligent construction of the sidewalk at the point where the accident happened; that the said sidewalk was allowed to be and remain out of repair and unsafe and with rotten, loose, weak and defective boards in it; that by reason of the defective condition of said sidewalk, the plaintiff, while walking along and upon the same, was caused or made to fall, "and then lay prostrate and helpless upon said sidewalk and the ground there with part of his body or limbs upon or close to the rails ~~xxxxxx~~ of a certain railroad that then and

there extended upon or alongside of or close to said sidewalk on said Larrabee street, and that thereby the plaintiff, without his fault, was unable to get up or change his position or remove his body or limbs or any part thereof away from said rail or track. " That while he then and there, by reason of the said several premises, but without any fault or negligence on his part, lay prostrate and in a helpless condition upon said sidewalk or ground there, unable to arise or change his position or remove his body or limbs or any one or part there then being at or near one of said rails of said track and said railroad, a certain locomotive engine or train of cars, or some part thereof then being propelled along and upon said rails or tracks or said railroad, then and there ran upon and struck against the plaintiff and more particularly one of his legs with great force and violence, and thereby the plaintiff, without his fault, sustained divers severe and permanent internal and external injuries on divers parts of his head, body and limbs." The defendant filed a plea of the general issue to the declaration.

The defendant contends that the verdict is clearly and manifestly against the weight of the evidence. We have carefully examined the record in this case, and while we are satisfied that the evidence, bearing on the material points, is close and conflicting, we are, nevertheless, clear that we cannot sustain the defendant's present contention. The jury saw the witnesses and heard them testify, and had a far better opportunity to judge of their credibility than we have, and after full consideration of the question, we feel that we cannot say that the verdict of the jury is clearly and manifestly against the weight of the evidence.

The defendant next contends that the "plaintiff's own testimony convicts him of negligence so gross that even he (a boy of nine years), must be held accountable for contributory negligence, as a matter of law." The question as to whether or not a person is guilty of contributory negligence is generally one of fact for the jury,

and it only becomes a question of law when the evidence so clearly fails to establish due care that all reasonable minds would reach the conclusion that the person was guilty of contributory negligence. If reasonable minds might arrive at different conclusions, it is a question of fact and must be submitted to the jury. This rule of law is so well established in this state that it is unnecessary to cite authorities in support of it. Considering the age of the plaintiff and all the circumstances surrounding the accident as testified to by the plaintiff, we are clearly satisfied that we would not be justified in holding that the plaintiff's evidence shows that he was guilty of contributory negligence as a matter of law.

The defendant next contends that the court erred in giving the plaintiff's instruction No. 3. In support of this contention the defendant argues that "if the jury had been limited in this peremptory instruction to a consideration of the case alleged in his declaration, the plaintiff must inevitably fail, because the case there set up is one based upon faulty construction alone, and of this there is no proof." The objection of the defendant to the instruction is that it allows the jury to consider the defective and rotten condition of the sidewalk without any allegation in the declaration that the city had notice of such defective and rotten condition. This contention of the defendant is without the slightest merit. The record shows that the defendant offered, and the court gave to the jury, no less than three instructions, permitting the jury to consider this element in the case.

The defendant next contends that "the declaration, although consisting of three counts, nowhere contains the essential allegation that the defendant knew or had notice of the existence of the defective condition of the sidewalk, which was proven on the trial, nor that the condition existed for sufficient time prior to the accident as to amount to constructive notice. The declaration was demurred to and the demurrer overruled, and properly so, because there is an

allegation of faulty construction, concerning which no allegation of notice is necessary as in such case the city is presumed to have knowledge of faulty construction of its sidewalks, but the proof does not sustain this allegation, but goes merely to defective and rotten condition, so that between the essential averments of the declaration and the proof, there is a fatal variance." This contention of the defendant is also without merit. The record shows that the defendant did not object to the evidence tending to show negligence on the part of the defendant by reason of the alleged defective and rotten condition of the sidewalk, on the ground of variance. Objection was made to some of the questions asked by plaintiff's counsel bearing on this element in the case, but the alleged variance was at no time pointed out to the court, and it further appears that the defendant thereafter cross-examined the witnesses in regard to the alleged defective and rotten condition of the sidewalk. The law of this state is too well settled to require the citation of authorities that the question of an alleged variance between the allegations and the proof cannot be raised for the first time on appeal.

The defendant has raised but four contentions on this appeal, and we have in this opinion specifically referred to each of these and disposed of the same. Holding, as we do, that the contentions raised by the defendant are without merit, the judgment of the Superior Court of Cook County must be, and it is, affirmed.

Affirmed.

34 - 20987.

MAGDELINE TERRAULT, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
CHICAGO CITY RAILWAY COMPANY, Appellant.	)	COOK COUNTY.

195 I.A. 70

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This is an action on the case brought by Magdeline Terrault, appellee, hereinafter called the plaintiff, against the Chicago City Railway Company, appellant, hereinafter called the defendant, in the Superior Court of Cook County, to recover damages for personal injuries claimed to have been sustained by the plaintiff through the negligence of the defendant. The action was originally brought against the Chicago Railways Company. Afterwards the defendant was made an additional defendant to the suit. The plaintiff, in her declaration, alleged that while she was in the act of boarding one of the cars of the defendants for the purpose of becoming a passenger, and while she was in the exercise of ordinary care for her own safety, the defendants, through their servants, carelessly and negligently caused the car to be suddenly and violently started, and she was thereby thrown with great force and violence from and off the car to the ground, and that she suffered a miscarriage and was otherwise greatly bruised and injured. Both defendants pleaded the general issue. The case was tried before a court and a jury, and during the progress of the trial the action was discontinued as to the Chicago Railways Company. A verdict was returned by the jury finding the defendant guilty and assessing the plaintiff's damages at $5,500. A motion for a new trial was overruled, judgment was entered on the verdict, and this appeal followed.

The defendant has assigned and argued a number of alleged errors. One of these, in our judgment, is meritorious and calls for a reversal of the judgment. The case is a close one on the material facts, and was strongly contested. Mrs. Spencer, called as a witness on behalf of the de-

fendant, gave testimony of a material and important character. The defendant complains that the trial court allowed the plaintiff, on the cross-examination of this witness, to ask a number of improper and incompetent questions, over the objection of the defendant, the sole purpose of which was to humiliate and degrade the witness and to prejudice the jury against her. We have read with care the entire examination of this witness, and we have reached the conclusion that a number of the questions put to the witness by the attorney for the plaintiff on cross-examination, and which the witness was allowed to answer, over the objection of the defendant, were not only incompetent, but were of a highly improper character, and the evident purpose of which was to degrade and humiliate the witness and to prejudice the jury against her testimony. Cross-examinations of this character have been frequently condemned. (Waters v. West Chicago St. R.R. Co., 101 Ill. App. [illegible]; People v. Brown, [illegible] Ill. [illegible]; Moherty v. Chicago Railways Co., [illegible] Ill. App. 159; Chicago City Ry. Co. v. Uhter, [illegible] Ill. 174; People v. Duncan, 261 Ill. 359.)

As we have heretofore said, the case on the merits is a close one, and the defendant was entitled to a fair and impartial trial. After a very careful consideration of the question, we find that we are unable to say that the improper cross-examination of Mrs. Spencer did not seriously prejudice the defendant's rights, and we are therefore compelled to reverse the judgment in this case and to remand the cause for a new trial.

REVERSED AND REMANDED.

554 - 20887.

PHILIP KARCHER, Appellant,	)	
vs.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.
DUDLEY A. TYNG & COMPANY, a Corporation, etc. C. W. GEORGE and WILLIAM C. JACKLIN, Appellees.	)	

1951 I.A. 62

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This is an action on the case to recover damages for alleged fraud and deceit brought by the appellant, Philip Karcher, against the appellees, Dudley A. Tyng & Company, C. W. George and William C. Jacklin. The declaration consists of two counts. The first count, in substance, charges the defendants with falsely, fraudulently and knowingly making certain false and fraudulent representations to the plaintiff as to the condition of the La Fourlate Manufacturing Company; that the plaintiff relied upon such representations and as a result thereof suffered a loss. The second count is substantially the same as the first count, save that it also charges that the defendants entered into a wilfull and malicious conspiracy, agreement and undertaking to cheat and defraud the plaintiff. To the declaration, all the defendants filed pleas of the general issue. The defendants have not filed briefs or appearances in this court.

The case was tried before the court and a jury, and a mass of evidence was ~~offered~~ introduced by the appellant in support of his case. The moment the plaintiff rested, the trial court, of his own motion, directed a verdict for the defendants.

The appellants contend that the court erred in directing a verdict for the defendants at the close of the plaintiff's case. We think this contention is meritorious. We have carefully read the record in this case, and we are satisfied that there was evidence introduced by the plaintiff that tended to prove the material allega-

tions of the declaration. The peremptory instruction should therefore not have been given. Libby, McNeill & Libby v. Cook, [illegible] Ill. 203.

The judgment of the Circuit Court of Cook County will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

924 - 20932.

CHARLES DRESSLER, Administrator of the Estate of FREDERICKA DRESSLER, Deceased, Appellant,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
JAMES H. VAN VLISSINGEN, Appellee.	)	COOK COUNTY.

1951.A.63

MR. PRESIDING JUSTICE SCHALLER delivered the opinion of the court.

The appellant, Charles Dressler, administrator of the estate of Fredericka Dressler, deceased (hereinafter called the plaintiff), brought an action in assumpsit in the Superior court of Cook county against the appellee, James H. Van Vlissingen (hereinafter called the defendant). The suit was brought to recover on a promissory note executed by the defendant at Chicago, dated December 1, 1903, for the principal sum of $1,500, payable on or before December 1, 1906, to the order of Fredericka Dressler, with interest at six per cent. per annum. The defendant filed a plea of the general issue and also a special plea, alleging that on September 20, 1904, he filed a petition in bankruptcy in the District Court of the United States, for the Northern District of Illinois; that in said petition he scheduled the note mentioned in the declaration; that on October 11, 1904, he was, by the said court, declared and decreed a bankrupt, and that on January 31, 1905, an order of discharge was entered by said court in said cause. To the special plea the plaintiff filed a replication alleging that he ought not to be barred from maintaining his action upon the note by reason of the said discharge, because the defendant, after September 20, 1904, expressly promised the payee of the note to pay the said note to her, and that at divers times after January 31, 1905, the defendant again expressly promised her that he would pay the said note to her, and that on August 9, 1908, the defendant did pay $50 upon said note, which payment was duly endorsed thereon, and that on July 9, 1913, after the death of the payee of the note, the de-

fendant expressly promised the plaintiff, the administrator of the estate of the payee, that he, the defendant, would pay the sum of money specified in the said note to the plaintiff, the administrator of the estate of the said Fredericka Dressler, deceased. The case was tried by the court without a jury, and the issues were found in favor of the defendant. Judgment was entered upon the finding and this appeal followed.

The sole question raised by this appeal "is whether or not the defendant, after he filed his petition in bankruptcy and after his discharge, did make a new promise to pay the note." The plaintiff contends that the finding and judgment of the court are against the weight of the evidence on this vital question in the case.

The discharge in bankruptcy released the debt of the defendant, arising out of the note, and to revive the same the promise of the defendant to pay the note would have to be clear, distinct, and unequivocal. St. John v. Stephenson, 90 Ill. 98. The mere recognition or acknowledgement by a bankrupt of a debt which has been discharged by bankruptcy does not create a legal obligation on him to pay the debt. Without a clear and express promise to pay the debt, discharged in bankruptcy, neither payment of interest, nor part payment of principal, nor declaration of intention to pay, will suffice to revive the same. Willette v. Gotherson, [illegible] Ill. App. [illegible]; Wilson v. Chandler, 1[illegible] Ill. App. [illegible]; St. John v. Stephenson, supra.

When the evidence in this case is tested in the light of the above rules, it seems clear to us that the defendant, after his discharge in bankruptcy, did not make a clear, distinct and unequivocal promise to pay the note. On the contrary, we think there is much force in the conclusion reached by the trial court, that over the evidence of the plaintiff did not show that the defendant made a clear and unequivocal promise to pay the note, and that it, at most, tended only to prove that the defendant expressed a desire to pay it.

But, even if it be conceded that there is evidence in the case tending to prove the plaintiff's theory that the defendant, after the discharge in bankruptcy, did make a clear, distinct and unequivocal promise to pay the note, nevertheless, we are satisfied that the weight of the evidence does not support the plaintiff's theory of the proof. On August 9, 1909, the defendant paid $50 on account of the note. At the time of this payment, the defendant was given the following receipt:

"Chicago, Aug. 9, 1909.
Received of J. A. Van Vlissingen, fifty ($50.00), but which I am under no obligation to, and am not, to repay, same being a voluntary contribution from him on account of claims or demands now barred; and in consideration of above payment, it is stipulated and agreed that same or any other act committed or permitted by him to and including this date, shall not operate in any way as a waiver of the existing legal or equitable bar against any further claim or demand whatsoever I may have against him.

(Signed) FREDERICKA DRESSLER and
JOHN DRESSLER,
By OSSIAN CAMERON,
Their Attorney."

We are convinced that the weight of the evidence sustains the contention of the defendant that he never at any time since his discharge in bankruptcy promised to pay the note. The judgment of the Superior court of Cook county will be affirmed.

AFFIRMED.

604 - 20943.

SARA G. HUGGINS, Appellee,	)	
vs.	)	APPEAL FROM
LILLY GOTTSCHALK, et al.	)	SUPERIOR COURT
	)	COOK COUNTY.
ALBERT WESLEY GOTTSCHALK, Appellant.	)	

195 I.A. 64

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Sara G. Huggins, appellee, filed her bill in the Superior court of Cook county to foreclose a trust deed covering certain real estate situated in Cook County, Illinois. The trust deed was executed by Lilly Gottschalk, and was given to secure the payment of certain promissory notes. All of the xxxx notes were signed by said Lilly Gottschalk and were made payable to herself, and were endorsed by her and Albert Wesley Gottschalk, appellant. At the time of the filing of the bill, some of the xxxx notes were owned by the appellee. A decree was entered finding, inter alia, that there was due to the appellee the sum of $641.47, with interest thereon from December 27, 1912, and also the sum of $75 as reasonable solicitor's fees, and a sale of the real estate was ordered, unless such sums, together with the costs of the suit, were paid within ten days. The decree further provided that "after the coming in and the confirmation of the master's report of sale in case any deficiency is shown in the amount due to the complainant, Sara G. Huggins, she shall be entitled to execution against the defendant, Lilly Gottschalk and Albert Wesley Gottschalk, personally liable therefor." This appeal is prosecuted to reverse said decree, and the sole appellant is Albert Wesley Gottschalk.

The appellant assigns and argues a number of grounds for the reversal of the decree. With the exception of one, which we will refer to, all of these contentions are without the slightest merit.

The appellant contends that "the decree is wrong in that it attempts to hold him a plain endorser, not a maker, for the entire indebtedness, principal, interest, taxes, abstract bill, master in chancery fees, court costs, solicitor's fees and the publication charges. His only undertaking was for the amount of principal and interest." The only part of the decree that bears on the appellant's present contention is as follows: "After the coming in and the confirmation of the master's report of sale in case any deficiency is shown in the amount due to the complainant, Sara E. Huggins, she shall be entitled to execution against the defendants, Lilly Gottschalk and Albert Healy Gottschalk, personally liable therefor." The question raised by the appellant as to whether the complainant is entitled to a deficiency decree against him is not now before this court for determination, as the decree in the respect complained of is not a final one from which an appeal may be taken. Eggleston v. Morrison, 185 Ill. [illegible]; Oates v. Jennett, [illegible] Ill. [illegible]; Thomson v. Black, 208 Ill. [illegible]. So far as the decree of the superior court is final between the appellant and the appellee, we find no error in it, and it will therefore be affirmed.

[illegible].

157 - 20471.

A. M. FORBES CARTAGE COMPANY, Defendant in Error,	)	
	)	ERROR TO
vs.	)	
	)	MUNICIPAL COURT
THE FRANKFORT MARINE ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of Frankfort-on-the-Main, Germany, Plaintiff in Error.	)	OF CHICAGO.

1951 I.A. 75

MR. JUSTICE FITCH delivered the opinion of the court.

This suit was brought in the Municipal court to recover from the defendant insurance company the amount of a judgment for personal injuries, with costs and attorney's fees, which the plaintiff, A. M. Forbes Cartage Company, was obliged to pay and which, it claimed, was covered by an insurance policy issued by the defendant. The plaintiff recovered a judgment for $875.20, and this writ of error was sued out by the insurance company.

By the terms of the insurance policy, the defendant insured the plaintiff "against loss and expense arising or resulting from claims upon the assured for damages on account of bodily injuries * * * suffered by any person or persons in consequence of any and every accident caused by any of the draught or driving animals or vehicles owned or used by the assured." This liability, however, is made subject to several conditions, among which are the following: "Immediately upon the occurrence of an accident the assured shall give the company written notice thereof, with the fullest information obtainable at the time. The assured shall also give the company immediate written notice of any claim which may be made on account of such accident. Immediate notice shall be construed to mean not later than fifteen days after the accident occurs in the case of notices of accidents, and not later than five days after claim is made in the case of notices of claims."

On January 18, 1912, one of the plaintiff's horse-drawn vehicles ran into a street car on which one Kazimer Fisla was

riding as a passenger. The accident happened directly in front of the plaintiff's barn. The plaintiff's president testified that he talked with the driver and the superintendent (who was in the barn at the time), that he learned from them "that the tongue of the wagon broke through the door or vestibule of the car," but that "so far as he knew" it was purely "a property accident," in which no person was injured, and that for this reason, the plaintiff did not report the accident to the insurance company. Neither the driver nor the superintendent testified in this case. On April 20, 1912, the plaintiff was served with summons in a suit brought by Kisla to recover damages for alleged injuries received by him in the collision of January 18, 1912. The plaintiff at once sent this summons to the insurance company. The defendant made inquiries of the investigators of the street car company, and of Kisla's wife and his attorney, and then wrote to the plaintiff that as no report of the accident had ever been received from the plaintiff, the defendant would not defend the suit unless the plaintiff would agree that the insurance company might retire from the defense of the suit in case it should thereafter appear that "any one in authority had knowledge and notice of the accident or any claim thereafter in time to have given the company notice within the provisions of the policy." The plaintiff declined to make this stipulation, and itself defended the Kisla suit, with the result that a judgment for $800 was entered against it for personal injuries sustained by Kisla at the time of the collision.

We think it is clear that the purpose of that provision of the insurance policy requiring the insured to give written notice to the insurance company "immediately upon the occurrence of an accident, * * * with the fullest information obtainable at the time," is to enable the insurance company to ascertain all the facts and circumstances surrounding the accident, while such facts are fresh

in the memory of witnesses, in order that it may be prepared either to defend, or to make settlement, in case any claim should thereafter be made or suit brought for damages for resulting personal injuries. It was admitted that the plaintiff had knowledge of the accident that occurred on January 15, 1912, and that the wagon tongue had gone through the door of the street car. It was also admitted that plaintiff made inquiries for the purpose of ascertaining whether any one was injured at that time. Evidently plaintiff made these inquiries for the purpose of ascertaining whether any claim for personal injuries was likely to be made. These inquiries apparently satisfied the plaintiff that no such claim could be successfully made, and therefore it did not notify the insurance company. In doing this, it acted at its peril. The contract does not make the duty of giving notice of the occurrence of accidents dependent upon the result of the plaintiff's inquiries. It requires notice to be given the insurance company, so that the insurance company may ascertain the facts for itself. This is one of the conditions upon which the promise of defendant was predicated. When, therefore, the plaintiff assumed, as the result of its own inquiries, that no claim could successfully be made for injury to any person resulting from the accident, without notifying the insurance company as provided by the contract, it thereby elected to carry the risk itself, and thereby absolved the insurance company from liability for any injurious consequences that might subsequently become known.

It follows that the court erred in refusing the peremptory instruction to find for the defendant, which was requested by the defendant at the close of the plaintiff's case. It follows also that the plaintiff's statement of claim, which is no broader than the evidence, fails to state a good cause of action against the defendant. The judgment will therefore be reversed and judgment entered in this court in favor of the defendants for costs.

JUDGMENT REVERSED.

230 - 20554.

ABRAHAM SLIMMER and LANE J. THOMAS, doing business as SLIMMER & THOMAS, Plaintiffs in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
DOLLIVER SAVINGS BANK, a corporation, and CONTINENTAL and COMMERCIAL NATIONAL BANK OF CHICAGO, a corporation, (as garnishee), Defendants in Error.	)	OF CHICAGO.

MR. JUSTICE FITCH delivered the opinion of the court.

The plaintiffs, Slimmer and Thomas, brought an attachment suit in the Municipal court against the Dolliver Savings Bank, a non-resident corporation, to recover an alleged indebtedness of $913.50. The Continental and Commercial National Bank of Chicago was served as garnishee, and answered, admitting that the savings bank had $[illegible],[illegible].11 on deposit with the garnishee. Upon a trial before the court without a jury, the court found that there was due the plaintiffs from the saving bank the sum of $119.34, and judgment was rendered accordingly. The plaintiffs have sued out this writ of error.

The plaintiffs reside in St. Paul, and are dealers in cattle. In February, 1912, C. J. Trowbridge, of Dolliver, Iowa, owed them $18,876, which was secured by chattel mortgage on certain cattle sold to him by the plaintiffs. Trowbridge was also indebted to the Dolliver Savings Bank, and to L. J. Stillman, its cashier, which indebtedness was secured by chattel mortgages upon other cattle and property belonging to Trowbridge. The plaintiffs received word that Trowbridge was about to have an auction sale of all the property on his farm near Dolliver, Iowa, including the mortgaged cattle, and the plaintiff, Thomas, attended the sale, which occurred on February 18, 1912. He found Stillman there "clerking the sale." Stillman introduced himself to Thomas. Thomas said he had just looked over the cattle and thought they would not realize enough to pay the mortgages. Stillman said he thought there would be enough, but "there

won't be much of a surplus." After some further talk during which Stillman pointed out that it would be difficult to identify and separate the cattle covered by the several mortgages, Thomas suggested that the cattle be sold in bulk, and if they did not sell for enough to pay the mortgages, the plaintiffs and Stillman would "pro-rate any shortage" there might be. To this Stillman assented and the sale was made upon that understanding. The gross amount realized from the sale of cattle upon which the plaintiffs and Stillman held mortgages amounted to $15,886.25. One Degan gave his check for $3,137 for cattle purchased by him at the sale and this check was turned over to the plaintiffs.

On February 13, 1912, Stillman wrote a letter to Thomas, giving an itemized statement of the results of the sale. In this statement, the gross amount for which the cattle upon which the plaintiffs and Stillman held mortgages were sold, was given as $15,913.50, and the amount due on their mortgages as $16,657.35, "leaving a shortage of $743.85, not taking into account the expense of holding the sale." Following this, the statement adds that "Mr. Trowbridge's sale amounted in the aggregate to $23,271.77," that the total amount of mortgages and liens against his property, including the expenses of the sale, was $23,815.49, leaving a shortage of $553.74. This statement shows that a merchant of Dolliver was paid $100.43 for "lunch for sale," and that the auctioneer's fees amounted to $150, making the total expense of the sale $250.43. There was another item in the same statement as follows: "0 per cent. discount on face of sale $465.23," but this item was not then explained.

Upon receipt of this letter, the plaintiffs replied expressing their surprise at the amount of Trowbridge's indebtedness, and urging Stillman to "make every effort possible to get our money in full" and requesting him to "kindly remit us the balance due as near as possible pending the collection of what balance there may be."

Five days later, February 24, 1912, Stillman wrote to the plaintiffs, inclosing a draft for $3,592.30, "to apply on the Crowbridge cattle deal as per following statement." Following this was a statement that the total amount realized from the sale of cattle upon which the plaintiffs and Stillman held mortgages, was $15,913.50, from which $27.25 had been deducted for "1 steer short," leaving the net proceeds $15,886.25. The letter then proceeds as follows:

> "The expense of the sale amounted to 3% including auctioneer fee, expense for lunch and discount, $476.58. This subtracted from the amount of cattle sold for $15,886.25 left $15,409.67. The mortgage on the cattle amounted to $16,863.43 leaving a shortage of $1453.76. Shortage amounting to .0752. I have therefore disbursed the amount as follows:

Expense of sale - - - -		476.58
Slimmer & Thomas - - - -	$13765.00	
Less Shortage of .0752 - -	1035.70	12729.30
L. P. Stillman mortgage -	2898.43	
Less .0752 - - - - -	218.06	2680.37
Total - - - - - -		$15886.25
Amount due Slimmer & Thomas -		$12729.30
Less amount paid by Degan -		9137.00
Balance due for which draft is enclosed - - - - - -		$3592.30"

Following this statement, Stillman wrote in the same letter that he had taken a second mortgage on Crowbridge's horses and an assignment of some of his accounts. "and believe that I will be able to sell the property for enough to practically pay us out:" and that "I have taken this chattel mortgage to protect ourselves together with another local account here at Dolliver and assure you that I will do the very best I can to get it all in."

To this letter the plaintiffs replied, calling attention to the fact that the two statements differed materially as to the amount of the alleged shortage, and that the showing made in the second letter was "so entirely unsatisfactory to us * * * that we will not stand for this kind of a deal and will hold you for every dollar the cattle sold for under our mortgage." Whether Stillman replied to this, does not appear. Plaintiffs wrote a number of

letters during the following year, asking for further reports, and received a reply to one of them, stating the accounts had not been collected. Finally, on June 16, 1913, Stillman wrote that he had collected practically all the accounts, and that the plaintiffs' share of the amount collected was $119.24, which he offered to send to the plaintiffs, if they would take an unsold hay press "at a fair price and let it go toward your bill." Plaintiffs declined this offer and this suit followed.

It is apparent from the record that the theory upon which the trial court gave judgment for only $119.24 was that the acceptance of the draft inclosed in Stillman's letter of February 24, 1913, constituted an accord and satisfaction. In this, we think the court erred. There is nothing in the evidence to show that the draft was tendered to plaintiffs as a payment in full of a disputed claim. There was no dispute between the parties at that time as to the amount due. The exact amount due was known to Stillman, but was unknown to the plaintiffs. The letter states upon its face that the draft is "to apply on the Crowbridge cattle deal, as per following statement." While it is true that the statement thus referred to contains the words "Balance due for which draft is enclosed," yet something more than this is necessary to make the mere acceptance of a draft amount to an accord and satisfaction. To have that effect there must be "an honest difference between the parties as to the amount due" (Farmers & Mechanics Life Association v. Kline, [illegible] Ill. 599, 603), and the check or draft must be offered "under such circumstances as amount to a condition that it is to be received in full payment of the demand" (Snow v. Griesheimer, [illegible] Ill. [illegible]). The itemized statement in the letter of February 24, 1913, was merely a statement of an open or running account, which could only have the legal effect of an account stated or "account settled" if it was received and retained without objection, which was not the fact in this case.

Aside from these questions, it is apparent from the briefs that the only real dispute between the parties at this time is as to the amount of the shortage which should be pro-rated under the agreement made at the time of the sale. In the letter of February 16, 1912, this shortage was stated to be $748.93, "not taking into account the expense of holding the sale." The same letter, however, shows what was paid out by Stillman as the expense of the sale, viz: $250.43. In the second letter, the expense of sale is given as $476.58, which is three per cent. of the amount realized from the sale of the cattle on which the plaintiffs and Stillman had mortgages. There is no claim that any such amount was paid out by Stillman for expenses of the sale. The only attempt to justify this item is the statement in Stillman's explanatory letter of June 18, 1913, that "The arrangement with Mr. Crowbridge before the sale was that we were to clerk the sale and handle all papers without recourse and were to receive 3% discount from face of sale," and the further statement that the three per cent. charged as expense of sale included "auctioneer fee, expense for lunch, and discount." There is not a particle of evidence that the plaintiffs were parties to this agreement between Stillman and Crowbridge as to a "discount," or fee to the bank for "handling papers without recourse," and hence the item of $476.58 must be reduced to the actual expense of the sale, viz: $250.43.

Upon this basis, we have computed the amount that was due to the plaintiffs at the time the draft was sent to them, and find that the balance then due was $3,779.12, instead of $3,592.30. The difference is $186.82, which with interest from February 24, 1912, should have been allowed to the plaintiffs and added to the amount collected later, viz: $119.84. The judgment will therefore be reversed; and as the correct amount due the plaintiffs is merely a matter of computation from the admitted facts, the cause will not be remanded, but a judgment will be entered in this court in favor of the plaintiffs and against the Dolliver Savings Bank for $372.16, together with the costs of this court to be taxed,

and against the garnishee for $4,384.81, of which $372.16 and costs of this court are for the use of the plaintiffs, and the remainder for the use of the Dolliver Savings Bank.

REVERSED AND JUDGMENT HERE.

FINDING OF FACTS. The court finds from the evidence that on February 24, 1912, the Dolliver Savings Bank had in its hands belonging to the plaintiffs the sum of $198.82, received from the sale of certain cattle upon which the plaintiffs had a chattel mortgage lien; that interest upon that sum to October 6, 1915, at five per cent. per annum amounts to $33.81; that on June 13, 1912, said bank had in its hands the further sum of $119.24 belonging to the plaintiffs, as admitted in its letter of that date; that interest on this sum at the same rate to October 6, 1915 amounts to $14.73; that the taxed costs of the Municipal court in this case were $17.50; and that plaintiffs are entitled to be paid the aggregate sum of $372.16, together with the costs of this court out of the fund in the hands of the garnishee, viz: $4,384.81, and the Dolliver Savings Bank is entitled to the remainder thereof.

423 - 20455.

EVANGELOS MERAS and JOSF ROVOKIANES, Defendants in Error, vs. PETER G. ADINAMIS and GEORGE APOSLOS, Plaintiffs in Error.	)	ERROR TO SUPERIOR COURT COOK COUNTY.

1951 I.A. 2

MR. JUSTICE FITCH delivered the opinion of the court.

This writ of error was brought to reverse a judgment of the Superior court, which reads as follows:

> "This cause being called for trial come the plaintiffs to this suit by their attorneys, and issues being joined, and neither the defendants nor their attorneys responding upon the call of said cause for trial, thereupon the plaintiffs by their attorneys move the Court that final judgment be entered herein upon the affidavit of claim filed herein by the plaintiffs, and thereupon it is ordered by the Court that final judgment be entered herein in favor of the plaintiffs and against the defendants upon the plaintiffs' affidavit of claim filed herein in the sum of Four Hundred Dollars ($400.00) for want of prosecution.
>
> "Therefore it is considered by the Court, that the plaintiffs do have and recover of and from the defendants the said sum of Four Hundred Dollars ($400.00) together with their costs and charges in this behalf expended and have execution therefor."

The suit in which this judgment was rendered was an action in assumpsit. The declaration consisted of an indebitatus assumpsit count for goods, wares and merchandise sold and delivered, a quantum valebant count, and five common counts in assumpsit, for money lent and advanced, for money had and received, for interest, for value of work done and material furnished, and upon an account stated. To this declaration was attached an affidavit of claim stating that the demand of the plaintiffs is "for money obtained from the plaintiffs by the defendants," amounting to $400. Appended was a copy of written contract for the sale of the defendants' confectionery store in Chicago to the plaintiffs, which states that the purchasers have deposited with the sellers $200 to be applied on the purchase price, "in case the above mentioned deal shall be consummated" within five days: that if the "deal" is not so con-

summated, "through the fault of" the purchasers, said deposit shall be retained by the sellers as liquidated damages, but if the sellers refuse to execute a bill of sale then they shall return the deposit and pay $200 in addition thereto as liquidated damages. The defendants filed their written appearance and a plea of the general issue, accompanied by an affidavit of merits, made by the defendants' attorney, as to the whole of the plaintiffs' demand.) It appears from the record that the case was placed upon the short cause calendar, and the judgment above quoted was entered when the case was reached for trial upon that calendar.

The judgment is clearly erroneous for several reasons. If the judgment can be considered as a judgment by default, it has repeatedly been held that it is error to render a judgment against a defendant by default, while a plea to the merits remains on file.

In Mason v. Abbott, 83 Ill. 445, a suit was brought against four defendants, including one Mason. A plea was filed on behalf of all the defendants. Later, the action was dismissed as to all the defendants except Mason, and a judgment by default was rendered against him. Mason sued out a writ of error in the Supreme Court, and the judgment was reversed, the court saying: "It was error to render judgment against Mason by default, when his plea to the merits of the action was on file. This question has repeatedly been decided by this court. Lyon v. Barney, 1 Scam. 387; Manlove v. Bruner, ib. 300; Dovell v. Marks, ib. 401; Chinney v. Ray, ib. 334; Steelman v. Watson, 4 Gilm. 149; Carmis v. Clark, 17 Ill. 398. * * * So long as the plea of Mason was on file, he could not be regarded as being in default, nor could a judgment be rendered against him except upon a trial."

In Manlove, et al. v. Bruner, 1 Scam. 300, an action of ejectment was brought, and after a plea of not guilty was filed, the plaintiff had the defendants called, and upon their not appearing, their default was entered, and a judgment that the plaintiff recover

his term and costs of suit was rendered. The Supreme Court said: "This was clearly erroneous. After issue is joined, the plaintiff, to obtain judgment, must proceed and try his cause by a jury, in the same manner as if the defendants had answered to their names when called."

In Keeler, et al. v. Campbell, 24 Ill. 288, an action of assumpsit was brought, and a declaration filed, consisting of a special count and the common counts. A demurrer was interposed to the special count, and the general issue was pleaded to the common counts. The court overruled the demurrer and defaulted the defendant, assessed the damages and rendered judgment without in any way disposing of the issue made by the common counts and the general issue. The court said: "It was also erroneous to assess the damages while the issue upon the common counts was undetermined. * * * The court, or the clerk under its direction, had no power to assess the damages while there was an issue of fact pending in the cause."

Counsel for defendants in error, in their brief, treat the judgment as a judgment by default, and contend that sections 58 and 59 of the present Practice Act give the court the power to enter a judgment by default under the circumstances above stated. In Westling v. Hughes, 49 Ill. 388, it was held that a section of the Practice Act then in force, which is identical with section 58 of the present act, had no application to a case brought on a written contract, even if there was a default. As a matter of fact, there was no such default as is contemplated by section 58. Section 59 refers only to the assessment of damages after a default has been taken. When there is a plea on file, a default does not exist merely because the defendants do not appear at the time the case is called for trial. Before they can be in default, the plea must be stricken from the files upon due notice. Otherwise, the issue joined must be tried, and in the Superior court, unless there has been a waiver of a jury trial, the issue must be tried by a jury. (McDonnell v. Harter, [illegible] Ill. 28:

Kenlove v. Bruner, supra.)

Counsel for defendants in error also state that the plea that was filed in this case was not signed, and therefore it is a "nullity." It is not necessary that a plea of the general issue should be signed by anybody (Tidd's Practice, 672, 673); and if it were, it should have been stricken from the files before a default could be entered.

For the reasons stated, the judgment of the Superior court will be reversed and the cause remanded.

[illegible].

280 - 20990.

OSCAR E. SHAFFER and EDITH SHAFFER, Defendants in Error,	)	
vs.	)	MUNICIPAL COURT OF CHICAGO.
NATOMA FARM, a corporation, Plaintiff in Error.	)	1957

MR. JUSTICE MITCH delivered the opinion of the court.

The plaintiffs, Oscar E. Shaffer and Edith Shaffer, brought suit in the Municipal court against the Natoma Farm, a corporation, to recover damages for breach of a contract of employment, and upon a trial before the court without a jury, recovered a judgment for $[illegible]. It is contended on behalf of the defendant that the evidence fails to show any contract of employment, that the evidence does not support the finding as to the amount of damages, that the plaintiffs, themselves, were in default under the terms of the alleged contract, and that the contract alleged to have been entered into is void under the statute of frauds. The first three contentions raise mere questions of fact. The fourth is a question of law.

Without discussing the evidence in detail, we are of the opinion, after a careful examination of the evidence in the light of the contentions made, that the finding is not manifestly against the weight of the evidence. While the evidence as to the making of a contract for a year is conflicting, there are circumstances tending to corroborate the plaintiffs' evidence in this respect, particularly the letter of the defendant's superintendent, addressed to E. Shaffer, requesting the latter to "come and see" him on a certain day, and adding: "If we can make a deal for you to stay with us for six mos. or a year, think the way is open." As to the amount of damages, we think the court would have been justified, under the evidence, in finding that $[illegible] was due to the plaintiffs, and the defendant cannot complain merely because the amount allowed was less than

that sum. We find no evidence of any default on the part of the plaintiffs, for although it is true that the plaintiffs did not appear at the farm on October 9, 1915, according to the agreement in evidence, it appears that they were prepared and ready to go, but did not go because the defendant's superintendent telegraphed them not to do so.

As to the fourth contention, viz: that the contract is void under the statute of frauds, we think the defendant is not in a position to raise this objection. The rule is well settled that the if the statute of frauds is relied on as a defense, it must be pleaded, unless the plaintiff's pleadings are not in such form as to advise the defendant xxxxxxxxxxxx of the precise nature of the claim. In this case, the plaintiffs' statement of claim avers that a contract was made on a certain date, by which the plaintiffs were to give their services for a year beginning nine days after the contract was made. To this claim, the defendant filed an affidavit of a meritorious defense, in which it merely denied that any such contract was made without mentioning the statute of frauds. An affidavit of merits filed in the municipal court is not technically a pleading, and there is nothing in the record to show whether such affidavit was made voluntarily or in pursuance of some rule requiring it to be filed, but in either case, it served the purpose of a statement of the nature of defendant's defense to the plaintiffs' claim. The issue having been made by the plaintiffs' statement of claim and the affidavit of merits, and a trial having been had upon the issue so made, the defendant could not defend upon any different theory without asking leave to file, and filing, an amended or additional affidavit. The record shows that after the evidence was all in, the defendant orally urged the statute of frauds as a defense, but he did not, at that or any other time, ask or obtain leave to file an amended affidavit of merits. It is too late to urge such a defense in this court when it was not properly before the trial court for decision.

For the reasons stated, the judgment of the municipal court will be affirmed.

AFFIRMED.

436 - 20931.

WILLIAM T. WAMBEK, Appellant,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
RENAULT FRERES SELLING BRANCH, a New York Corporation, Appellee.	)	OF CHICAGO.

MR. JUSTICE FINCH delivered the opinion of the court.

This is an appeal from a judgment of the Municipal Court in favor of the defendant upon a directed verdict. The suit was brought to recover damages for an alleged breach of warranty in the sale of an automobile. The plaintiff's amended statement of claim avers that plaintiff bought an automobile of the defendant on October 10, 1910, at which time the defendant "warranted the automobile and divers parts thereof and equipment thereon to be free of defects in material, workmanship and construction and to be reasonably useful and usable for the purposes for which it was manufactured and sold and that it would remain free from defects in material and workmanship and that the material and workmanship would not give out, break or wear out during the reasonable use of the automobile or during the life of an ordinary automobile;" that at the time of such sale, divers parts of the machinery and equipment were defective in construction and workmanship, and that other defects developed soon after, particularly in the tires, valves, pistons, wrist-pins, cam-shaft and transmission; that plaintiff spent $1,000 "in endeavoring to reconstruct and rebuild said automobile and remedy the defects" but was unable to eliminate the defects therefrom, and that the automobile was a complete loss to him because of the breach of warranty and the faulty construction.

The evidence of the plaintiff tended to prove that the plaintiff was an agent of the defendant, residing at San Jose, California; that prior to 1910 he had bought seven of defendant's automobiles; that he had a sign upon his place of business in Cali-

fornia, on which was painted the words "Guaranteed for Life," which referred to defendant's printed warranty of its automobiles, contained in all of defendant's catalogues, viz: "Cars sold by us are fully protected and guaranteed for life against any defect in manufacture and workmanship;" that in October, 1910, the plaintiff was in New York City and was induced by defendant's manager there to buy a new model known as "Renault's American Special," for which he paid $3,200; that the manager suggested that the plaintiff drive this car from New York to San Francisco, in order to demonstrate that it was a practical car for use on American roads, saying that this car, like all defendant's cars, was guaranteed for life, and that "if everything went well" on the trip, the defendant would completely overhaul the car, upon its arrival in San Francisco, without expense to the plaintiff; that plaintiff did not test the car before he bought it; that after he had bought it, the defendant took the plaintiff out in it in order to demonstrate its qualities as a hill-climber, but the car failed to climb the low grade upon Riverside Drive until after it had been taken back to the shop and readjusted, when it "took a hard run and finally succeeded in getting up;" that during this ride there was "a noise, a slam, or side slap" in the front cylinder of the engine; that the car was taken to the shop again and "tuned up" and plaintiff then drove it about town for a day or two before he started on his trip to San Francisco; that plaintiff called defendant's attention to the "slap" in the engine, and was told that if it did not "work out" on his trip, defendant would "fix it up" when the car arrived at San Francisco; that plaintiff then started upon his trip, accompanied by his wife and a chauffeur recommended by defendant; that the tires gave out after going a distance of about forty miles; that the piston "slap" increased, until by the time they reached Chicago, "an awful knock in the cylinders" was noticeable, and when the car was running less than fifteen miles an hour, another "slap" was heard "in between the fly-wheel and transmission;" that upon arriving at Chicago, plaintiff

put the automobile in the Renault garage at that place, and his mechanic worked for two days on the machine endeavoring to make it run smoothly, but with little success: that plaintiff then proceeded on his trip, and after encountering bad roads in Iowa, sagebrush trails and alkali deserts in Wyoming, and snows in the mountains, finally arrived at San Francisco, having made the distance of 3,[illegible] miles in 102 hours of actual running time: that during the whole trip the noise in the engine continued and was more pronounced at the end than at the beginning of the journey; that the car was then placed in defendant's garage in San Francisco, where it was overhauled and a number of new parts put in, and it was then turned over to the plaintiff, the defendant's agent saying that the car "was in good shape so far as he knew;" that the plaintiff then used the car about a week in San Francisco, and drove it to Seattle, where he used it ten or fifteen miles a day for five weeks, then returned to San Francisco and left the car in a garage while he took a trip around the world; that upon his return he shipped the car to Chicago, put new tires on it, "fixed it up," and offered it for sale, eventually selling it for $800. There was also some evidence tending to prove that the engine trouble, which was the chief cause of complaint, was not caused by wear on the pistons or cylinders, but was because the pistons "were fitted too loose in the first place."

During the trial, the plaintiff attempted to prove that defendant failed to carry out its alleged agreement to overhaul the car without expense to him upon his arrival at San Francisco, but on the contrary, had charged and collected from the plaintiff the sum of $805 for repairs made on the car at that time. The court ruled that this evidence was incompetent because the plaintiff was "not suing for that." There was no error in the ruling. There was no averment in the plaintiff's statement of claim under which such evidence was admissible. If the defendant was liable for any amount

paid for general repairs on the car, such liability arose from a breach of defendant's promise to make such repairs without cost to the plaintiff, and not from any breach of warranty shown by the evidence. The court called attention to the fact that no such claim was made in the plaintiff's statement of claim, but the plaintiff did not choose to amend. No attempt was made by the plaintiff to show that any part of the sum so claimed to have been paid was expended for the purpose of curing "any defect in manufacture or workmanship." The excluded evidence was apparently offered for the sole purpose of recovering, as damages for an alleged breach of a warranty of quality, the amount paid for general repairs on the machine. "While the formalities of pleading have been abolished by statute, it is still the law in the Municipal Court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment." (Walter Cabinet Co. v. Russell, 250 Ill. 418, 420.)

The same answer may also be made to many other of the rulings complained of. The only warranty shown by the evidence is the warranty contained in the catalogue, viz: "Cars sold by us are fully protected and guaranteed for life against any defect in manufacture and workmanship." This warranty is not set out in these terms in the plaintiff's statement of claim, but is set forth according to what the plaintiff claimed to be its legal effect. Such statement, however, is much broader than the warranty itself. The plaintiff attempted to prove that the automobile in question was defective in its design and plan of construction, and that this particular type of car was afterwards discarded by the defendant as mechanically wrong in principle. The plaintiff also attempted to prove that the life of an ordinary automobile was at least two years. This evidence would have been competent if the warranty shown by the evidence could be construed to have the legal effect stated in the plaintiff's statement of claim, but all such evidence was immaterial and irrele-

vant in view of the only warranty that was proved. The alleged agreement to overhaul the car in San Francisco without cost to the plaintiff was not a warranty, but was a special agreement made after the car had been purchased, the only consideration for which, if there was any, was the supposed advantage that would accrue to the defendant by a demonstration of the wearing qualities of the car during such a trip as the plaintiff was about to make. The warranty proved was a warranty "against any defect in manufacture and workmanship" that may exist in any car sold by the defendant, and such warranty continued "for life," i.e., during the life of that particular car. The word "manufacture" as used in this warranty, evidently refers to the process or operation of converting the raw materials into the finished parts for use in the automobile, and the word "workmanship" evidently refers to the character of the work done by the workmen in the factory. It does not cover defects in the design or plan of the car, but only such defects as may be caused by or during the process of converting the raw materials into finished parts, or by some lack of skill on the part of the workmen. The trial judge was clearly right in excluding all offered evidence tending to prove any defect in the design of the car or the plan of its construction, unless it could be shown that such defect resulted from some defect in workmanship or in the process of manufacturing the several parts of the machine.

However, the court also excluded all offered evidence tending to prove that the noise in the engine and in other parts of the machine was due to improper fitting of the several parts. In this we think the court erred. If all the parts were properly manufactured, and some of them were so carelessly or improperly put together as to cause the noise, or "knock" complained of, the result would clearly be a defect in workmanship; that is, it would be due to a lack of skill on the part of the workmen in the factory. As above stated, there was evidence tending to prove that the "knock"

or "slap" in the engine was due to the fact that the pistons used did not fit the cylinders. If this be true, then there was a breach of the warranty shown by the evidence, and the plaintiff would be entitled to recover such damages as he might be able to prove he sustained by reason of such breach. There was also some evidence tending to prove that the tires were defective, either in manufacture, or workmanship, or both. The plaintiff was entitled to have these questions submitted to a jury, and as to such questions, the court erred in directing a verdict for the defendant.

Appellee has assigned certain cross-errors upon the record. It claims that the suit was originally brought against an Illinois corporation named "Renault Frères Selling Branch," but that after service was had upon such corporation and an affidavit of merits was filed by it denying that it sold the car in question to the plaintiff, the plaintiff discovered that he had made a mistake in suing the Illinois corporation, and filed an amended statement of claim in which he inserted, after the words "Renault Frères Selling Branch," the words "a New York corporation." It is claimed that this was, in effect, an attempt to substitute another defendant for the sole defendant sued. The record shows that there are two corporations of the same name, one in New York, and the other in Illinois, and that when the plaintiff discovered that the original summons had been served upon an agent of the Illinois corporation instead of the New York corporation, he procured another writ and it was served in Chicago upon an agent of the New York corporation. Thereafter, when the New York corporation appeared specially and moved to dismiss the suit upon the grounds above stated, the plaintiff's attorney filed an affidavit stating these facts and stating that the words "a New York corporation," which were added to the plaintiff's statement of claim by the amendment, is no part of the defendant's corporate name, and were added thereto merely "for the purpose of distinguishing the defendant that plaintiff intended to and was

trying to sue," from the Illinois corporation of the same name. There was no change of parties: there was merely a wrong service in the first place, and an amendment which did not change the name of the defendant, or substitute a different defendant. Service was had upon the defendant who was originally sued, and after such defendant had made an ineffectual motion "to have the suit declared terminated," it entered its general appearance and went to trial upon the merits. We are of opinion that the cross-errors are not well assigned.

For the reasons indicated, the judgment of the Municipal Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

S15 - 20848.

EMMA FRESLO, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
HUGO FRESLO, Appellant.	)	COOK COUNTY.

MR. JUSTICE FITCH delivered the opinion of the court.

The defendant, Hugo Fresla, seeks by this appeal to have reversed an order of the circuit court, committing him for contempt of court in wilfully refusing to comply with an order of that court requiring him to pay to his wife, Emma Fresla, the sum of $[illegible] a week as temporary alimony, pending the hearing of the wife's suit for separate maintenance. The bill charges the defendant with cruelty and adultery, and alleges that he is a man of large means, with an income of ten or twelve thousand dollars a year. The defendant, by his sworn answer to the bill, denied that he was guilty of the charges made against him, and denied that he was possessed of as much property as is stated in the bill of complaint. His answer admits, however, that he is the owner of real estate amounting in value to at least $12,000, exclusive of the encumbrances thereon. The defendant filed a cross-bill, accusing his wife of adultery, and it is evident from the allegations of the original bill, the answer thereto, and the cross-bill, that there is a very bitter quarrel between the two. Upon a preliminary hearing as to the question of alimony *pendente lite*, the circuit court ordered the defendant to pay $[illegible] a week until the further order of the court, and $25 solicitor's fees. No appeal was taken from that order, and apparently it was not complied with to any extent whatever. Several months later, a rule was entered against the defendant to show cause "in person" why he should not be punished for contempt for failing to comply with the order. The defendant appeared in person in answer to the rule, and also filed an affidavit. From the showing made in the affidavit it would appear

that although he is possessed of considerable real estate, yet all the income from the same is required to pay the interest on incumbrances, taxes and other charges thereon, or at least is expended in that way, that he is suffering from atrophy of the optic nerve, from which he is nearly blind, that he recently invested several thousand dollars in a theatrical enterprise which failed, and that his only real income consisted of such amounts as he may be able to earn as an assistant to a real estate broker. The court thereupon asked the defendant to take the witness stand, and upon being interrogated, it appeared that at the time of the hearing he was negotiating four different sales of real estate, from which his expected commissions would amount to at least $200. He claimed upon the stand that he had been obliged to borrow $100 from his employer to meet his expenses. Thereupon the court continued the hearing for two weeks, to enable the defendant to get in some of the expected commissions. Upon the second hearing, it appeared that one of the sales had been closed, but that his employer, instead of paying over defendant's share of the commission, had kept it to apply upon the loan above mentioned. The court evidently thought that these facts indicated an intention on the defendant's part to evade the order of the court, and again continued the hearing, with the statement that he must pay at least $40 on account of alimony, or he would be committed for contempt. Upon the next hearing came on, the defendant claimed that he had been unable to raise more than $10, which he offered to pay to the complainant. Thereupon the court adjudged him guilty of contempt of court and entered the order appealed from.

We are of the opinion that the court was justified in entering the order of commitment. While it is true that there is no evidence to contradict the defendant's statement that it takes all his income to pay the charges upon his real estate and his own expenses, yet we think it fairly appears that he could have raised the small amount suggested by the court, if he chose to do so, and

that his attitude before the court was that of a man who could, but would not, comply with the order of the court in any respect. The record indicates that the chancellor was very lenient under the circumstances, which, no doubt, was prompted by due consideration for the physical condition of the defendant. If he had shown any attempt to comply with the order of the court, doubtless the chancellor would not have considered it necessary to commit him.

The order of the Circuit Court will be affirmed.

81 - 20884.

ATHERINE BOSCO, a minor, by her xt friend, ANGELO BOSCO, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
STON STORE OF CHICAGO, a corpor- tion, Appellant.	)	COOK COUNTY.

195 I.A. 133

MR. JUSTICE FITCH delivered the opinion of the court.

This is an appeal from a judgment of the Superior court in suit brought to recover damages for personal injuries sustained by ppellee. The suit was originally brought against the Boston Store d the Grabowsky Power Wagon Company, a corporation. The declaration harged that at the time of the accident the ~~Leitz Company~~ Grabowsky Power Wagon Company, a dealer auto-trucks, was operating, driving and managing certain auto-trucks long the public streets of the city of Chicago "in conjunction with e defendant Boston Store;" that while the plaintiff ~~(appellee)~~, a irl seven years old, was crossing Madison Street at the intersection Pauline Street, and was in the exercise of such care and caution for r own safety as might be expected of a child of her tender years, the fendants so negligently drove one of their auto-trucks that through eir negligence, the auto-truck ran into the plaintiff and threw her the ground, causing divers serious permanent injuries. To this claration the Boston Store filed a plea of not guilty, and three ecial pleas, which aver that at the time of the accident, the Boston ore did not own, manage, operate or drive the auto-truck in question, ther in conjunction with the Grabowsky Power Wagon Company or otherise, and aver that the auto-truck in question was, at the time and ace of the accident, owned, operated, driven and managed by ~~x xxxxxxx~~ t the Grabowsky Power Wagon Company. Upon the trial, the plaintiff tered a non-suit as to the Grabowsky Power Wagon Company, and the use proceeded as against the Boston Store alone. A verdict was reurned in favor of appellee against appellant for $15,000. Upon the

motion for a new trial, appellee remitted $3,000, whereupon the motion was overruled and judgment entered for $12,000.

As we have concluded that a new trial must be had on account of the error hereinafter stated, we refrain from reciting the facts in detail, and from expressing any opinion on the evidence.

Under the special plea filed, the question whether the driver of the auto-truck was the servant of the Boston Store or of the Wagon Company was a material issue in the case. The direct evidence introduced by appellee upon this issue merely showed that at the time of the accident, the auto-truck was driven by a man named Tubbs, that one other man (who afterward appeared to be an employe of the Boston Store) was riding in the truck at the time, that there were some boxes, or packages of merchandise, and some burlap, in the truck, that the name "Boston Store" was painted on the outside of the truck, and that the name of the Grabowsky Power Wagon Company was on the running gear. This was prima facie evidence of possession and control by the Boston Store (C. C. C. & I. Ry. Co. v. Gallaghan, 157 Ill. 400), but this prima facie case was subject to be overcome and rebutted by other evidence. Appellant introduced some evidence tending to prove that at the time of the accident, the auto-truck was owned and controlled by the Grabowsky Power Wagon Company, who were carrying goods belonging to the Boston Store, under an arrangement of some kind between the Wagon Company and the Boston Store regarding this service. The court refused, however, to permit appellant to show what the agreement was. Appellant offered to prove that about six weeks prior to the accident, the Wagon Company (which, as above stated, was a dealer in auto-trucks) made a proposition to the Boston Store to put one of its trucks in use carrying goods for the Boston Store between its warehouse and its department store, for the purpose of demonstrating the efficiency of its trucks; that the Wagon Company would furnish the truck and the driver, pay the wages of the driver, who should operate the truck, furnish all the oil and gasoline, and pay all other expenses of the trial or demonstration;

that the Weston Store accepted this proposition, and the truck was being operated under this agreement at the time of the accident: that it was operated under what is known as a demonstrator's license: that the Weston Store had not purchased the truck, had no control of any kind over the driver other than to point out the way he should go: that the goods were loaded into the truck, and unloaded from it, by employes of the Weston Store, and that one of such employes sometimes accompanied the load, but without having anything to do with the operation or management of the truck.

In Foster v. Wadsworth-Howland Co., 1[illegible] Ill. [illegible], a girl seven years old was on her way from school in Chicago, and was crossing Clark street at the intersection of Polk street. She walked on the north side of the crossing, going west, when she was struck by a wagon and killed. The wagon had the name of the Wadsworth-Howland Company and its place of business painted thereon, but it appeared from the evidence that the driver was in the employ of one Smiddie, who owned the wagon and had made a contract with the Wadsworth-Howland Company to do its hauling for a specified sum per week. It was there said, in substance, that while the fact that the Wadsworth-Howland Company's name was painted on the wagon was prima facie evidence of possession and control by that company, yet this prima facie case was overcome by proof of the facts above stated, which showed that Smiddie was an independent contractor, and therefore that his driver was not a servant of the Wadsworth-Howland Company, and that the latter was not liable for his negligence.

In Pioneer Construction Co. v. Hansen, [illegible] Ill. 100, it was said: "He is the master who has the choice, control and direction of the servants. The master remains liable to strangers for the negligence of his servants, unless he abandons their control to the hirer. Control of servants does not exist, unless the hirer has the right to discharge them and employ others in their places." This decision was cited with approval in Harding v. St. Louis Stock Yards, 248 Ill. 444, and in Connolly v. People's Gas Light Co., 250 Ill. 162.

Under these decisions, the fact of ownership and control having been made an issue by the special pleas filed by appellant, it was competent for appellant to prove the exact nature of the relation between it and the wagon company, in order to determine whether Hubbs was a servant of appellant, and it was error for the court to refuse to permit such evidence to be introduced, when properly offered. If the witness who was on the stand at the time the offer was made, had testified to the matters contained in the formal offer that was made, it would certainly have had a tendency to sustain the pleas filed by the defendant, and thereby exonerate appellant from liability. The error was therefore prejudicial to the rights of appellant.

For the error indicated, the judgment of the superior court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ELLA A. PIXLEY, Appellant,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
ILLINOIS COMMERCIAL MEN'S ASSOCIATION, Appellee.	)	OF CHICAGO.

MR. JUSTICE FITCH delivered the opinion of the court.

In 1905, the Illinois Commercial Men's Association, appellee, issued its accident insurance policy, or membership certificate, to Wilson H. Pixley of Buffalo, New York, which recites that in consideration of the statements and declarations contained in his application for membership, which application "is hereby referred to and made a part of this contract," and in consideration of his admission fee paid, said association "does hereby receive" said Pixley as a member of said association: "and upon the consideration aforesaid," and the further consideration of the payment of his annual dues and assessments, "in case of the accidental death of said member there shall be payable to Ella A. Pixley (wife) of Buffalo, N. Y. * * * within ninety days after the receipt by said Association of satisfactory proof of the happening of said accidental death, the sum of $5000.00 * * * in accordance with, and subject to, each and all of the provisions of the by-laws of said Association, * * * which said by-laws are hereby referred to and made a part hereof as fully as if they were recited at length over the signature hereto affixed."

The application for membership signed by said Wilson Pixley contains the following paragraph: "I agree that the said Association shall not be liable under its certificate of membership for any injury which may happen to me while under the influence of intoxicating liquors or narcotics, or in consequence thereof, * * * nor from intentional or unintentional taking of poison."

The by-laws referred to in the membership certificate contain the following provisions:

"Art. 7, Sec. 2. Whenever any member of this association in good standing shall, through external, violent and accidental means, receive bodily injuries which shall, within ninety days from and after the date of said accident, and independently of all other causes, result in the death of said member, and only in such case, the beneficiary named in the application of said member * * * shall be paid * * * within ninety days after the receipt by the association of proof, satisfactory to the board of directors, of said injuries and of the accidental cause thereof, the sum of Five Thousand Dollars."

"Art. 7, Sec. 8. This association shall not be liable to any person for any indemnity or benefit for injuries * * * resulting from an accident to a member which happens while said member * * * was in any degree under the influence of intoxicating liquors or narcotics, or which shall happen on account of, by reason of, or in consequence of, the use thereof: * * * or in case disability or death shall occur as the result wholly or partially, directly or indirectly, of any of the following causes, conditions or acts, or while the injured member was under the influence of, or affected by, any such cause, condition or act, to-wit: * * * intentional or unintentional taking of poison."

On September 24, 1911, said Wilson R. Pixley died in Buffalo, New York, while a member in good standing of the defendant association, from an overdose of morphine, self-administered. On proof of death being furnished to the association, it denied liability, whereupon appellant, the beneficiary named in the policy above mentioned, brought suit in the Municipal court of Chicago to recover the amount of indemnity provided for in the policy. Upon the trial, the court instructed the jury, at the close of all the evidence, to find the issues in favor of the defendant, which was accordingly done, and from a judgment entered on that verdict, the plaintiff appeals.

The essential facts are undisputed. It appears from the evidence that prior to his death, Wilson Pixley was the Buffalo representative of extensive business interests; that he maintained an apartment in that city, and was possessed of a summer home and farm on the lake near the city; that he was subject to severe attacks of headache, and on two or three occasions, many years before his death, he had taken morphine to relieve the pain; that in September, 1911, his wife was at the summer home, and the city apartment was occupied by two women, employes of the deceased; that on Friday, September 22, 1911, Pixley told one of these women that he had not been well, and was

nervous, ~~and "wanted to rest up, was going to his farm to stay a~~ ~~month or six weeks and take care of his grapes:"~~ that the following morning he appeared at the apartment and said to the woman who opened the door for him, "I am awfully sick, and want to come in and go to bed;" that he also said that he did not want a doctor, but merely wanted to rest; that he went into his bedroom and shut the door: ~~that the woman heard him moving around in his room,~~ and about noon, he sent ~~to a hotel for his grip, and sent~~ word to his wife "that he was at the apartment being taken care of, and for her not to worry:" that he ate nothing that day: that about two o'clock in the afternoon, one of the women stepped to the door of his bedroom, opened it and asked him if he wanted anything, receiving a negative reply; that he was then standing in front of the dresser, holding a bottle containing small white tablets; that he had two or three of the tablets in his hand, and was counting out others; that in reply to an inquiry as to what he was taking, he said it was "something to ease the pain" in his head, "some medicine he got at the drugstore;" that he asked for a glass of water, and handed the bottle containing the tablets to the woman, who took it from the room and left it in a bedroom adjoining, where it was found the next day; that about half an hour later, he became nauseated, and went into the bathroom, but returned to his bedroom a few minutes later; that about six o'clock in the evening, he came out, partly dressed, went to the kitchen, where he chatted with the woman for an hour and a half; that he said he felt better, and thought he would go to the farm: that he then went back to the bedroom, dressed, and came out with his hat and overcoat on, smoking a cigar; that he sat down and talked for another half hour, and then, saying that he felt "shaky," he returned to his bedroom, undressed and went to bed; that during the night he grew worse, and in the morning two physicians were called, but they were unable to arouse him, and he died about eleven o'clock Sunday evening: that an autopsy was had, and the doctors making it certified "that the findings were consistent with morphine poisoning," and "that no other

cause of death was found." It was stipulated in the record, however, "that the deceased died from an overdose of morphine."

Appellant's first contention is as follows: "Inasmuch as there is a conflict between the provisions of the policy and the by-laws of the company with respect to its liability the provisions of the policy must prevail." The alleged conflict thus referred to has its supposed basis in the fact that the policy provides that "in the case of the accidental death of said member, there shall be paid * * * the sum of Five Thousand Dollars;" while the by-laws provide that "Whenever any member of this association in good standing, shall, through external, violent and accidental means, receive bodily injuries which shall * * * result in the death of said member, and only in such case," the prescribed indemnity shall be paid. It is urged that under the above quoted clause of the policy, standing alone, appellee is only required to prove that the death of Wilson A. Pixley was accidental, regardless of the means or cause of death, while under the above quoted provision of the by-laws, appellee is required to prove that the death of Mr. Pixley was the result of bodily injuries received through accidental means; and, applying the well-known rule of construction that requires any doubt or ambiguity in an insurance contract to be resolved in favor of the insured, it is insisted that the terms of the policy must control, and that appellee is entitled to recover on proof that the deceased knowingly and intentionally took the quantity of morphine causing his death, because (it is said) "such death was accidental, although the means were not."

We do not find it necessary to follow this argument or to determine whether it would be sound in a proper case, for the reason that there is no such conflict between the policy and the by-laws as is supposed. By the express terms of the policy, the liability of the company is made subject to all the provisions of the by-laws, which are therein expressly referred to and made a part thereof. The application, policy and by-laws are all parts of one and the same contract, and

hen so considered, there is no such doubt or ambiguity as would equire, or authorize, the application of the rule of construction bove mentioned. It follows that it was incumbent upon appellee to rove not only that the death of the deceased was accidental, but that uch death was caused by "external, violent and accidental means," and hat it was not caused by the "intentional or unintentional taking of oison," nor while the deceased was under the influence of any narcotic.

It is insisted that the evidence fairly tended to prove not nly that the death of Wilson Pixley from an overdose of morephine was ccidental, but also that his death from that cause was "the result of odily injuries received through external, violent and accidental means," ithin the meaning of those words as used in the by-laws. Both those ontentions may be conceded. An accidental death is one that is undesigned, or unintended. The antithesis of the word "accidental" is ntentional." There is no evidence of any kind in the record tending o prove that the deceased took the overdose of morphine with the intention of causing his death. On the contrary, all the evidence tends o prove that there was an entire absence of any motive that would rompt the deceased to take his life, and that his only motive in taking orphine on the day before he died was to obtain relief from the very evere headache from which he was suffering. The evidence is all to he effect, and is undisputed, that morphine may be taken in small uantities, suited to the physical condition of the individual, not only ithout harmful results, but with beneficial results, in many cases, nd that it is only an overdose that is poisonous, or necessarily injurious to life, in any case. It may fairly be inferred from the vidence that the deceased did not know what quantity of morphine constituted an overdose in his case, either because he was not familiar ith the effects of morphine in general, or because he did not know what uantity would affect him injuriously. In either case, the taking of poisonous dose of the drug was evidently far from his intention and as therefore accidental. That a death so caused is "the result of

bodily injuries received through external and violent means," within the meaning of such a policy of insurance, was squarely held in Healey v. Mutual Accident Association, 103 Ill. [illegible]. In that case the court said: "If a person should receive a gun-shot wound in the body, resulting in death, it would be conceded that death ensued from violent and external means; for a like reason, poison taken into the stomach, producing death, may also be treated as an external, violent means. Indeed, we are inclined to concur with what was said by the Court of Appeals of New York, * * * that where a death is the result of accident, or is unnatural, (it) implies an external and violent agency as the cause."

Conceding, however, that the evidence tends to prove that the deceased came to his death "through accidental, violent and external means," within the meaning of the policy in question in this case, it does not follow that appellee was entitled to recover under the terms of said policy; for, under another provision of the policy, the association was exempted from liability if the death of Wilson Pixley resulted from an accident which happened while he "was in any degree under the influence of narcotics, or in consequence thereof," or if his death resulted "in whole or in part, directly or indirectly, from the intentional or unintentional taking of poison." It is clear from the evidence that morphine is a narcotic, and that he was under the influence of such narcotic (intentionally administered) at the time of his death. It is also clear from the evidence, that while morphine is not a poison in the sense that it is necessarily injurious to life when taken in proper doses and under proper conditions, yet an overdose of morphine is poisonous. There is no conflict in the evidence as to these facts. As above stated, it was stipulated that Wilson Pixley came to his death as the result of an overdose of morphine. Under the evidence in this case, therefore, this stipulation amounts to an admission on appellant's part, that the deceased came to his death by taking a poisonous dose of morphine.

If the language of the policy in this case merely exempted the association from liability where the death was caused by the "taking of poison," (that is, if those words were not preceded by the words "intentional or unintentional,") we would have the highest authority for holding that such an exemption would be unavailing as a defense to an action on the policy, unless it were shown that the taking of the poisonous dose was designed and intended to cause death. Such was, in effect, the holding in Paul v. Travelers' Ins. Co., 112 N. Y. 472, cited with approval in the Healey case, supra, and followed in Travelers' Ins. Co. v. Dunlap, 100 Ill. 424; Metropolitan Accident Association v. Freiland, 101 Ill. 40; and Travelers' Ins. Co. v. Myers, 217 Ill. 590. In all of such cases, the court held that in the absence of any language in the contract that clearly showed an intention on the part of the insurance company to exempt itself from liability in case of the accidental, as well as the intentional, "taking of poison," the exemption so expressed must be construed to cover only cases of intentional taking of poison. By the terms of the policy in this case, however, the exemption expressly covers cases of accidental, or unintentional taking of poison, as well as those where the taking of poison is intentional. The language of the exemption is: "This association shall not be liable to any person for any indemnity * * * in case * * * death shall occur as the result, wholly or partially, directly or indirectly, of the * * * intentional or unintentional taking of poison." There can be no doubt as to the meaning of this clause of the policy, and there is therefore no room for the application of the principle that in cases of ambiguity, the doubt must be resolved against the insurance company.

It therefore follows that upon the stipulated and undisputed evidence, appellant was not entitled to recover, even though the taking of the overdose of morphine was accidental, and the death was caused by accidental, external and violent means, within the meaning of the policy in question.

Finding no error in the record among those assigned and discussed in the briefs of appellant's counsel, the judgment of the municipal court will be affirmed.

AFFIRMED.

570 - 20905.

SAMUEL ROTHBART, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
MARSHALL FIELD & COMPANY, Appellant.	)	COOK COUNTY.

MR. JUSTICE FITCH delivered the opinion of the court.

This is an appeal from a judgment for $800 rendered in the Circuit Court upon a verdict of a jury in a personal injury case. At the close of the plaintiff's evidence, and also at the close of all the evidence, the defendant moved for a directed verdict in its favor. Both motions were denied and proper exceptions taken. The motion for a new trial, after the verdict was rendered, was withdrawn. The errors assigned are that the court erred in denying the motions for a directed verdict, and in denying defendant's motion to exclude a part of the plaintiff's evidence as hearsay.

The question presented by the first of such assignments, is whether there is in the record any evidence fairly tending to prove the material averments of the declaration. (Libby v. Cook, 222 Ill. 206.) The declaration consists of two counts. The first count alleges, in substance, that on December 23, 1911, the plaintiff, a minor, was in the defendant's employ, and that the defendant ordered the plaintiff to ride on top of one of its wagons, which was heavily loaded with merchandise, and to guard and protect the various articles of merchandise comprising said load: that while the plaintiff was riding on said loaded wagon, and was in the exercise of due care for his own safety, "a certain vice-principal of the defendant, and not a fellow servant of the plaintiff, carelessly and negligently drove, controlled and managed said wagon along a certain public street in the city of Chicago, county of Cook and state of Illinois, known as Clark street, at and in the vicinity of the intersection of said Clark street with 18th street, in said city, and under a certain bridge or viaduct then

extending over said street, at a height of, to-wit, one foot above the top of said load, without informing the plaintiff of the approach of said wagon to said viaduct, or of the danger of passing under the same; and by reason thereof, the plaintiff struck with great force and violence against parts of said viaduct, and was then and thereby thrown from said wagon and down on the street," etc., and was seriously injured.

The second count contains the same averments as to the employment of the plaintiff, the loading of the wagon, the alleged negligent order to ride on top of the load of merchandise, without informing the plaintiff of the danger that would be incurred by his in going under railroad bridges and viaducts extending across public streets, and then avers that while the plaintiff was exercising due care and caution for his own safety, the defendant moved said wagon along Clark street and under a viaduct near the intersection of 18th street, "and by reason of the said great and dangerous height of said load, and its close proximity to said viaduct or bridge, the plaintiff then and there struck with great force and violence against the parts of said viaduct and bridge, and plaintiff was then and thereby thrown from said wagon," etc.

It will be noticed that in each of said counts the immediate cause of the injury alleged in the declaration is that the plaintiff struck or was struck by a viaduct while sitting on top of the wagon. We are unable to find in the record any evidence fairly tending to support this averment of the declaration. No witness testified that such was the fact. It appears from the evidence that there is a bridge or viaduct crossing Clark street about fifty feet north of 18th street, which is fifteen or sixteen feet above the ground. The plaintiff testified, however, that he did not know this fact; that he had never seen it and did not see it on the occasion in question; that he was sitting on top of a case of goods in the rear of the wagon, about twelve feet above the ground; that the front of the wagon was piled up with parcels

higher than the place where he was sitting: that he remembered turning from 12th street into Clark street, but that he did not notice how far he had gone south of 12th street when the accident happened; that as the wagon was going south (somewhere) on Clark street, he "felt something hit him in the back," and "dreamt he was diving off," and knew nothing more until he awoke in the hospital. Nevertheless, he several times used the expression in his testimony: "When I was hit by the viaduct," or words to that effect. It is clear from his evidence that he did not at the time of the accident, nor at the time of the trial, know what hit him in the back. His statements that he was hit by the viaduct, and that the accident happened at the viaduct, were mere inferences or conclusions on his part. For this reason, the defendant moved, at the close of the plaintiff's testimony, to exclude such statements. This motion was denied and exception taken. This was error.

The only other evidence in the record as to the alleged fact that he was struck by the viaduct is that of two witnesses who testified that after the accident, they saw him lying south of the viaduct, in front of a saloon at the corner of 16th street. Neither of such witnesses, nor any witness who testified, saw him when he fell from the wagon. The ruling above mentioned was therefore error prejudicial to the plaintiff; and as the evidence which was thus permitted to stand is the only evidence in support of the allegation that the plaintiff was struck by the viaduct, it follows that the ruling of the court in denying the motions at the close of the plaintiff's case and at the close of all the evidence, to find a verdict for the defendant, were also erroneous.

It is also contended that the relation of fellow servants existed between the driver and the plaintiff, and there is much force in the contention. As, however, we have reached the conclusion that the case must be remanded on account of the errors already indicated, we express no opinion upon this question, which is ordinarily a question of fact for the jury.

For the reasons indicated, the judgment of the Circuit Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

70 - 20,913.

n re Estate of LIZZIE ~~L.A.~~ PAGE,	)	
n Appeal of JOHN LA PAGE,	)	
Appellant,	)	APPEAL FROM
	)	
vs.	)	CIRCUIT COURT
	)	
~~m~~ F. DEVINE, Administrator of the	)	COOK COUNTY.
estate of LIZZIE ~~L.A.~~ PAGE, et al.,	)	
Appellees.	)	

MR. JUSTICE FITCH delivered the opinion of the court.

On Saturday, April 18, 1914, which was the last day of the arch, 1914 term of the Circuit court of Cook county, that court, onorable Adelor J. Petit presiding, entered a decree overruling cer-ain objections made by appellant, John LaPage, to an order of distri-ution in the matter of the estate of Lizzie L.A.Page, deceased. The ause in which such decree was entered had been heard by Judge Petit n November, 1913, and at the conclusion of the hearing, he took the ase under advisement, saying that when he had reached a conclusion, e would notify counsel of that fact. At some time between one and ree o'clock in the afternoon of April 17, 1914, Judge Petit's minute lerk, by direction of the Judge, telephoned to the offices of counsel n both sides that the court would render a decision on the following ay - Saturday; and before four o'clock of the same day, counsel for ppellees caused a notice to the effect that at ten o'clock on Saturday, hey would ask the court to enter findings and judgment in favor of ap-ellees, and a copy of the findings and decree which were afterwards ntered, to be served upon appellant's counsel, Herman Welk, by deliver-ng the same to a stenographer employed by him and then in charge of his ffice in Chicago. It appears, however, that Mr. Welk did not person-lly receive word of either the telephone communication of the minute lerk or the formal notice given by appellees' counsel until the Monday ollowing (after the term had expired), for the reason that before either f such notices was given on Friday afternoon he had been called to his ome in Lemont by the illness of his wife, and remained there all Satur-

day and Sunday. The telephone message was received at his office on Friday afternoon by a real estate broker who had an office in the same suite, and the other notice was received, as above stated, by Mr. Welk's stenographer; but so far as the record shows, neither the real estate broker nor the stenographer made any attempt to notify Mr. Welk that such notices had come to them, until he returned to his office on Monday, April 20, 1914. Thereupon he made a motion to set aside and vacate the decree entered on April 18, 1914, filing with his notice of such motion, the affidavits of himself and of the stenographer as to the facts of which they had knowledge. When this motion to vacate was called up before Judge Petit, on April 21, 1914, oral statements on both sides were evidently made by counsel, and also by the court, and the clerk of the court, as to what had occurred on Friday and Saturday. The bill of exceptions shows that after the affidavits and oral statements of appellees' counsel had been heard, the court ordered that such oral statements "should be incorporated in affidavits and presented afterwards nunc pro tunc as of April 21, 1914, to form a part of the bill of exceptions," (which was in fact done, and the same filed on May 18, 1914) and then overruled the motion to vacate the decree. From this ruling, or order, John LaPage appeals.

Appellant contends in this court that the court erred in overruling the motion to vacate the decree entered on April 18, 1914, for the reason, it is said, that the motion, though made after the judgment term had expired, was in the nature of a writ of error coram nobis, and that the judgment or decree was entered through an error of fact. We are of the opinion that the latter part of this contention is not sound. The bill of exceptions contains a copy of the rule of the Circuit court that was in force at the time said judgment was entered, regarding the service of notice of motions. That rule requires that notice of a motion shall be served upon the opposite party, or his attorney of record, "before 4 p.m. of the business day next preceding the day mentioned in

the notice for calling up, either personally or by leaving a copy thereof at his office with some person in charge thereof on his behalf." We are unable to find anything in the bill of exceptions tending to prove that this rule was not literally complied with. Appellees' counsel caused a notice to be served upon appellant's counsel before four o'clock of Friday afternoon, April 17, 1914, by leaving a copy thereof at his office with a "person in charge thereof on his behalf," viz: his stenographer. It is not disputed that the stenographer was in the employ of appellant's counsel at that time, nor that she was then in charge of his office on his behalf. The affidavit of the stenographer states that when the notice was delivered to her, she informed appellees' attorney, who served it, "that she was unable to get word to Mr. Weik, and was not authorized by him to accept service, and did not accept service for him;" but there is no evidence that such were the facts, and there is nothing in the rule which would make the service any less effective, even if the facts so stated were true. The plain meaning of the rule is that a service is sufficient if a copy of the notice is left in apt time with some employe in charge of the office of the attorney to whom the notice is directed. But whether this construction of the rule is correct or not, is immaterial in this case, for the reason that it is evident the circuit court so construed the rule, and even if its construction were erroneous, such error would not be an error of fact, but an error of law, which cannot be corrected upon a motion in the nature of a writ of error coram nobis. (Cramer v. Commercial Men's Association, 174 Ill. App. 1; same case 240 Ill. 516.) "The error in fact which may be assigned under the motion must be some fact unknown to the court, which, if known, would have precluded the rendition of the judgment." (Cramer v. Commercial Men's Association, 240 Ill. 516, 522.) The only facts that were unknown to the court at the time the decree of April 18, 1914 was entered, were that Mr. Weik was not in his office when the notice was served, and had not personally

received the notices given him. Such facts, if known to the court, would not have "precluded the rendition of the judgment," for neither the practice apart from said rule, nor the practice under the rule, requires the court or counsel to see to it that opposing counsel shall be personally notified of any motion, nor to see that he is personally present at the time such a judgment is rendered. Counsel are bound to take notice of the rules of court. Under the rule above quoted, appellant's counsel was bound to know that a notice, upon which he would be bound to act, might be left at his office, with any person in his employ, at any time before four o'clock in the afternoon of any business day: and it was his duty, if called away suddenly, to so arrange his office affairs that any such notice, if so served, would be promptly communicated to him, or to make arrangements with someone to have such matters taken care of in his absence. In fact, Judge Petit certifies in the bill of exceptions that appellant's counsel told him that the failure of the stenographer to notify him was due to her inexperience in such matters. And while that fact, if known to the court at the time the decree was entered, might, perhaps, have been considered by the court sufficient ground to postpone the entry of the decree for a day or two, it was not such a fact as would have precluded the entry of the judgment.

The practice of entering a final judgment or decree on the last day of the term, in the absence of counsel, is a practice that is not to be commended. In Cook county, where the courts are continuously in session, there is no good reason why such judgments or decrees should be entered on the last day of the term. At the same time, a judgment so entered is not, for that reason alone, erroneous.

Finding no error in that part of the record which is before us on this appeal, the order of the Circuit court denying the motion to vacate the decree of April 19, 1914, will be affirmed.

Affirmed.

No. - 20940.

Thomas NOVY, Appellee,	)	APPEAL FROM
vs.	)	SUPERIOR COURT
Louis W. RYDEN COMPANY, Appellant.	)	COOK COUNTY.

Mr. JUSTICE FIFER delivered the opinion of the court.

By this appeal it is sought to reverse a judgment rendered in the Superior court for $3,000 for personal injuries sustained by appellee while in the employ of appellant.

Appellant had a contract to install twenty skylights in the roof of a one-story car barn at Rockford, Illinois. After three of them had been installed by an employe named Malmstrom, appellant, desiring to use Malmstrom's services elsewhere, directed the appellee Novy to go to Rockford and do the remainder of the work. Appellee was an experienced sheet metal worker, and the only instructions given him by appellant's president, Louis Ryden, who employed him, were to go to Rockford with Malmstrom, who would show him what was to be done. Appellee testified that before going to Rockford, he asked Ryden if everything needed was "down there," and Ryden replied: "Yes. All you need is your hand tools. Everything else is down there," which "included all material and everything to hoist up the material with."

Appellee and Malmstrom went to Rockford together. Malmstrom paid the fare of both with money he received from Ryden. They went to the car barn, looked it over, and the next morning started to work. Malmstrom hired two laborers living in the vicinity, to assist appellee. Appellee testified that there was no hoisting apparatus at the place where the work was to be done; and that he asked Malmstrom, "What are we going to get our stuff up with" that Malmstrom said, "You go aside of that building right about half or a quarter of a block, and you will find a derrick, a d s and we will get our material up with that derrick." Appellee went to the place indicated by Malmstrom, found an

old derrick in a pile of lumber, and he and the two laborers, with Walmstrom's help, raised it to the roof of the car barn.

The derrick consisted of an upright post, to one side of which a drum, operated by handles at each end, was attached, upon which a cable was wound, and from which the cable passed over a pulley at the end of a boom, also attached to the upright, and thence down to the ground. At the base of the upright were timbers extending in the opposite direction from the boom. Upon these timbers, counter-weights were placed to prevent the derrick from tipping over while in operation. At one side of the drum was a ratchet wheel and a dog, or pawl, attached to the upright, designed to catch in the cogs of the ratchet wheel and prevent the drum from turning backward. This derrick had not been used for several weeks, and had never been used by appellant or appellee.

After the derrick was on the roof, appellee and the laborers put it together and set it in place, using for counter-weights some sacks filled with frozen sand obtained from an adjoining vacant lot, a barrel of charcoal, several packages of other material, and a piece of railroad iron. After this was done, Walmstrom, who (according to appellee's testimony) was supervising the work of setting up the derrick, remarked that the weights were "enough to hold 1000 pounds." Appellee also testified that after looking it over, Walmstrom said, "That swings a little. It don't exactly catch right, but that has got nothing at all to do with pulling up the weight when you get the weight on that cable;" that he also said the cable "was flimsy" and that "he didn't like that," but that nevertheless, Walmstrom told appellee to go ahead and finish the job as quickly as he could, and then went away.

After Walmstrom left, the two laborers used the derrick the remainder of the forenoon, and until about 2:30 in the afternoon, in hoisting the material to the roof. Then they fastened a barrel of putty

weighing 800 pounds to the cable, and attempted to hoist it. When they had raised it about fifteen feet above the ground, they called to appellee, who was working at another part of the roof, to "come over and give them a hand." Appellee took hold of one of the drum handles while the laborers held the other. By their combined efforts, the handles were turned several times, when something gave way and appellee was thrown from the roof to the ground. He sustained a compound fracture of both bones of the left leg above the ankle, resulting in a stiff ankle and deformed foot, with two and one-half inches shortening of the leg.

The declaration upon which the case was tried consists of a single count, in which the negligence charged is that appellant did not use reasonable care to provide and maintain a suitable derrick for the use of appellee, "that is to say, * * * did not maintain and provide a safe and proper pawl upon said * * * derrick, which pawl was necessary for the safe operation of the * * * derrick, of which said failure the defendant had knowledge." Appellant contends, first, that the negligence so charged in the declaration is not shown by the evidence; second, that if the pawl was defective, the plaintiff assumed the risk of injury therefrom; third, that the court erred in admitting testimony concerning the condition of the pawl two days after the accident; and fourth, that two of the given instructions were improperly given, and that one refused instruction was improperly refused.

As to the first contention, there is some evidence from which, if credited, the jury might reasonably find that the derrick was defective in the respect mentioned in the declaration, and that appellant, through its employe Malmstrom, had notice of that fact. It is true that this evidence was contradicted, and that if the evidence introduced by appellant were considered alone, or were given more weight than that introduced by appellee, the verdict should have been in favor of appellant; but where the evidence upon such questions of pure fact is conflicting, this court is not authorized to reverse the finding of the

jury and the judgment of the trial court, unless we can say, after an examination of all the evidence, that the verdict is manifestly contrary to the preponderance of the evidence. This we are unable to do, and must therefore hold that appellant's first contention, as made and argued in the Briefs filed in this court, is not well taken.

As to the second contention, that appellee assumed the risk of injury, there was evidence tending to prove that appellant delegated to Halmstrom the duty of furnishing to appellee suitable hoisting apparatus for his use, and that after it was set up, although Halmstrom said he did not like the way it worked, and that "it did not catch right," he nevertheless directed appellee to use it and "get through as quickly as he could," and that appellee complied with this command. From this evidence, a jury might well conclude that appellee relied upon Halmstrom's direction to use the derrick as an assurance that it might be safely used. It was not the duty of appellee to make a careful examination, or inspection, of the pawl. That duty devolved upon Halmstrom as the representative of appellant. In the absence of notice that the pawl was defective, appellee had the right to rely upon Halmstrom's inspection. The evidence was undisputed that notwithstanding the defect in the pawl, the derrick was successfully used by the two laborers for several hours after it was erected and before appellee was called by them to help them. Under these circumstances, we think it cannot fairly be said that the danger arising from the use of the derrick was so obvious that a reasonably prudent person, situated as appellee was at and just before the accident, would have refused to use it as directed. Nor do we think that in obeying the direction of Halmstrom under such circumstances, appellee assumed the risk of injury.

As to the third contention, there was some evidence tending to prove that the derrick was in the same condition two days after the accident as at that time, and, therefore, we think there was no reversible error in permitting the witness Stromgren to testify to its condition on the second day after the accident.

The third and fourth given instructions are not, in our opinion, fairly subject to the criticism made by appellant's counsel, viz., that they are not based upon the evidence. There was some evidence from which a jury might fairly infer that a proper inspection of the derrick before the accident would have disclosed the defect in the pawl, and also that appellee had been deprived by the accident, to some extent, of his ability to earn money. The fourth refused instruction was refused by the trial judge, as shown by a memorandum he made upon the margin thereof, because it might have been understood by the jury as announcing the view that it was the duty of appellee to make an examination, or inspection, for defects in any appliance furnished him. Under the facts of this case, the instruction would have been misleading, if not erroneous, and was therefore properly refused.

Finding no reversible error in the record, the judgment of the superior court will be affirmed.

AFFIRMED.

114 - 20982.

MARGARET LENIHAN, as administratrix of the estate of JOHN LENIHAN, Deceased, Appellee,	)	
vs.	)	SUPERIOR COURT
CHICAGO RAILWAYS COMPANY, Appellant.	)	COOK COUNTY.

1951.A.144

MR. JUSTICE FINCH delivered the opinion of the court.

This is an appeal from a judgment for $2,000 entered in the superior court in an action brought by appellee against appellant for negligently causing the death of John Lenihan, deceased. Appellant contends that the verdict is against the weight of the evidence; that the evidence shows that the deceased was guilty of a want of due care for his own safety; and that the court erred in giving one of the instructions offered on behalf of appellee. We have carefully examined the evidence in the light of the arguments of counsel on these questions, and feel impelled to say that the case is so close on the facts as to make it important that the instructions should have been free from any substantial error; and as we have reached the conclusion that the court committed prejudicial error in giving the fifth instruction, it will only be necessary to make a brief statement of the facts.

Appellant operates a double-track street car line on Western avenue in Chicago. Western avenue runs north and south. Polk street runs east and west, with a jog at Western avenue: that is: the south line of Polk street on the east side of Western avenue is nearly due west of the north line of Polk street on the west side of Western avenue. The sidewalk, therefore, on the south side of that part of Polk street which lies east of Western avenue, is north of the sidewalk on the north side of that part of Polk street lying west of Western avenue.

On December 28, 1911, between six and seven o'clock in the morning, John Lenihan was crossing Western avenue at the intersection of Polk street. There is some evidence that there was a wind blowing from

the south, accompanied by snow and rain. One of defendant's witnesses testified that "it was kind of dark, foggy, and some snow on the ground." One of appellant's street cars, going south on the west track on Western avenue, was approaching the intersection of Polk street, at a speed variously estimated by the witnesses at from seven to twenty miles an hour. Lenihan stepped off the sidewalk at the southeast corner of Polk street and Western avenue, and walked southeasterly toward the sidewalk at the northwest corner of said streets, thereby apparently following the most direct course from one sidewalk to the other. As he reached the west rail of the west car track, he was struck by the street car and killed. Whether he saw or heard the car coming, is not known. There was evidence tending to prove that although the motorman saw Lenihan when the latter first started to cross the street, the car being then about one hundred feet away, yet he merely sounded his gong, without applying the brakes, and made no effort to stop the car until Lenihan stepped directly in front of it, about twenty or twenty-five feet away.

By the fifth instruction given on behalf of appellee, the court told the jury, in substance, that if they believed from the evidence that John Lenihan, using due care for his own safety, attempted to cross the defendant's street car tracks at the intersection of Western avenue and Polk street, as alleged in the declaration, and that while crossing the same, was struck by one of defendant's street cars and injured thereby, "and if they further believe, from the evidence, that the defendant's servants and agents, who were managing said car, saw the said John Lenihan, or by the exercise of ordinary care could have seen it, in time, after he started to cross said tracks, to have closed up his car and have prevented said collision, then it was their duty to have done so, and a failure to perform such duty would be such negligence upon the part of defendant's servants as would render the defendant liable, provided the jury further believe, from the evidence, that a failure to check the speed of said car was the proximate cause of said injury, and that the plaintiff's intestate was in the exercise of due care for his own safety

at and before the time of collision." This is not the whole of the instruction, but the remainder of it refers to other alleged grounds of liability and has no connection with, or bearing upon, the part above quoted.

We are unable to construe the above quoted part of this instruction to mean anything else than that if the jury believed from the evidence that the motorman saw the deceased "in time to have slowed up his car and have prevented said collision," then it was the absolute duty of the motorman, as a matter of law, to do so, and that his failure to act in that particular manner in this case was such negligence, as a matter of law, "as would render the defendant liable" to appellee in damages, provided the motorman's failure to so act was the cause of the accident, and that deceased was in the exercise of due care for his own safety. There was no such duty resting upon the servants of the defendant, nor does it necessarily follow that the failure of the motorman to "slow up" was negligence. It was the duty of the defendant to exercise ordinary, reasonable care, under the circumstances shown by the evidence, to avoid a collision with the deceased: and what was ordinary and reasonable care, under such circumstances, was a question of fact for the jury. It was plainly invading the province of the jury to tell them that any particular act, or omission, was such negligence as would make the defendant liable as a matter of law. Similar instructions have been several times condemned by this court. (Weil v. Chicago City Ry. Co., [illegible] Ill. App. 199; Gracey v. Chicago Railways Co., [illegible] Ill. App. [illegible]; Kimmer v. Chicago Railways Co., 185 Ill. App. 545.)

It is urged that the instruction, which was very long and involved, is erroneous for other reasons. We do not deem it necessary to pass upon the other alleged errors. We think the error we have pointed out is sufficient to require a reversal of the judgment. While the instruction does not in terms direct a verdict, yet the language that "a failure to perform such duty would be such negligence upon the part of defendant's servants as would render the defendant liable," etc., amounts

such a direction, and therefore the errors in the instruction could not be cured by other instructions. The evidence being undisputed that the motorman did, in fact, see the deceased when he was one hundred feet away, and that he could have stopped his car, if he had tried to do so, in a much less number of feet, the jury could hardly do otherwise than find a verdict in favor of appellee, if they followed the instruction as given.

For the reasons stated, the judgment of the superior court will be reversed and the cause remanded for a new trial.

EDWARD ALL HANNAHAN.

177 - 20491.

JOSEPH DAMIANI, FRANK DE TRANA and ALEXANDER DE TRANA, executors of the Last Will and Testament of JOSEPH DE TRANA, Deceased, Defendants in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT OF CHICAGO.
THEODORE PROULX, Plaintiff in Error.	)	1951.A.154

STATEMENT OF THE CASE. This is a suit brought in the Municipal court of Chicago by Joseph Damiani, Frank De Trana and Alexander De Trana, executors of the last will and testament of Joseph De Trana, deceased, defendants in error and hereinafter referred to as the plaintiffs, against Theodore Proulx, plaintiff in error and hereinafter referred to as the defendant, to recover upon a promissory note executed by defendant, payable to the order of the said Joseph De Trana, now deceased.

The statement of claim set forth that plaintiffs were the executors of the last will and testament of the said Joseph De Trana, deceased, duly appointed by the Probate court of Cook county. It also set out the note in full, a copy of which was xxxx attached to and made a part thereof.

To this statement of claim defendant, who is an attorney at law, filed an affidavit of merits wherein he did not deny the execution of the said note, but claimed to have paid on said note the sum of $60; and further, that there was due him from the said De Trana, by reason of legal services rendered and disbursements advanced, the sum of $100.

On the same date defendant filed what he is pleased to call a "statement and affidavit of claim on set-off," which was but a repetition of his affidavit of merits, save that it is designated as a "statement and affidavit of claim on set-off."

No affidavit of merits was filed by the plaintiffs to this statement and affidavit of claim on set-off.

On the trial below, before the court without a jury, the court found the issues against the defendant and assessed the plaintiffs' damages in the sum of $359.10, and judgment for said amount was entered thereon; to reverse which the defendant has sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court.

Plaintiffs, in support of their statement of claim, introduced the said note in evidence, and offered testimony which showed that the amount due on said note, including interest, was $359.10. Defendant, to prove the matters of defense set out in his affidavit of merits, and also to prove his statement and affidavit of claim on set-off against the plaintiffs, offered his own testimony that he personally had paid deceased the sum of $50 on account of the said note; and further, that he had rendered legal services of the character set forth both in the affidavit of merits and in his statement and affidavit of claim on set-off, and had made certain disbursements on behalf of Joseph De Frans, deceased, in and about the legal services rendered.

Defendant also offered to prove, by another witness, the services rendered for which he had made a charge of $141. Several witnesses were called to show that the charge for such services was fair and reasonable. Objection to all this testimony was sustained.

Defendant complains of the ruling of the court on his offer of testimony; and further, that plaintiffs, suing as executors, having failed to introduce evidence of their appointment as such, the court erred in rendering judgment for them in their representative capacity.

As we read the affidavit of merits, only one claim set forth therein - namely, the claim that a payment of $50 had been made upon said note - can be considered in defense to the claim of the plaintiffs. The only evidence offered in support of this payment was the defendant's own testimony that he had paid such sum.

Such testimony was incompetent under sec. 2, Ch. 51, Hurd's R. S. of Illinois for 1911. Defendant was an adverse witness on his own behalf, in a suit brought against him by an executor. The ruling of the trial court in sustaining said objection was, therefore, proper.

The remainder of the claim set forth in the affidavit of merits which pertained to the services rendered by defendant for Joseph De Trana, deceased, personally, did not constitute a defense to the note: nor could it properly be considered as a set-off against the claim of the plaintiffs herein. The services set out in both the affidavit of merits and the statement and affidavit of claim on set-off, were rendered personally to Joseph De Trana, now deceased. If suit had been brought by the said Joseph De Trana, deceased, during his lifetime, they might have been considered as a set-off: but before such claim for services could be set off against the claim made by executors, defendant must first have presented such claim in the Probate court for allowance, which claim, if allowed, would properly become the subject matter of a statement and affidavit of claim on set-off in a proceeding brought on behalf of the estate. The court, therefore, properly sustained the objection of plaintiffs to the testimony offered by the defendant on his statement and affidavit of claim on set-off.

Defendant further complains that plaintiffs had not proven their appointment as executors. To this contention plaintiff replies that under rule 17 of the Municipal court it is provided that all matters set forth in the statement of claim and not denied in the affidavit of merits, are taken as admitted. However, the record does not show that said rule was offered in evidence, and this court has repeatedly held that it cannot take judicial notice of same. However, plaintiffs need not rely upon said rule. Defendant entered his appearance, and filed an affidavit of merits and a statement and affidavit of claim on set-off. His appearance was in the nature of a

plea of general issue, and the affidavit of merits and the plea of set-off constituted notices of his defense to the plaintiffs' claim. Neither in said affidavit of merits nor in said statement and affidavit of claim on set-off did defendant deny the fact that plaintiffs had been appointed executors of the aforesaid de Prera will and testament. Defendant, therefore, did not put in issue the representative character of the plaintiffs at the time of the suit, but admitted the same. Schultz v. Frech, 1[illegible] Ill. 4[illegible]; Schultz v. Lockbridge, 1[illegible]7 Ill. 270; Chicago Union Traction Co. v. Jerla, [illegible]7 Ill. 95. It was not necessary for plaintiffs to prove what had already been admitted by the defendant.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

201 - 20522.

JOSEPH PEKETE, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
ARTHUR KOWAK, Defendant in Error.	)	OF CHICAGO.

STATEMENT OF THE CASE. This is an action of forcible entry and detainer brought in the Municipal court of Chicago by Joseph Pekete, plaintiff in error and hereinafter referred to as the plaintiff, against Arthur Kowak, defendant in error and hereinafter designated as the defendant, to recover possession of premises occupied as a saloon, known as No. 1[illegible] West Grand avenue, Chicago. While the defendant and one Balaza were joined as defendants in the summons and both served, the defendant alone entered an appearance and the case proceeded to trial against him. On the trial below, the jury, under an instruction by the court, returned a verdict finding the defendant not guilty, upon which verdict judgment was entered against the plaintiff for costs, to reverse which the plaintiff has sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court.

Defendant occupied the premises in question under a lease from plaintiff to himself and the aforesaid Balaza, the lease bearing date February 15, 1[illegible]. The premises had theretofore been occupied as a saloon and the lease provided that they should continue to be used only for such purposes. Paragraph 10 of said lease provided as follows:

> "And the parties of the second part further covenant agree and bind themselves to keep the saloon and dance hall in strict accordance with the law; and that if the parties of the second part should at any time violate or infringe upon the law as just how the saloon and the dance hall should be managed, then the relation between the landlord and tenant shall wholly cease, and the parties of the second part will vacate said premises at the written request of the party of the first part. And the parties of the second part agree to assume a contract entered into by and between Atlas Brewing Company and Joseph Pekete on or about June 15, 1911, wherein said Pekete agrees to purchase beer from said Atlas Brewing Company, and

more particularly known as Mamet and Bohemian Export, at the price named in said contract, that is to say - Mamet Seven Dollars ($7.00) per barrel and Bohemian Export at Six Dollars ($6.00) per barrel; said prices are subject to market fluctuations."

While the evidence shows that no contract was entered into between the Atlas Brewing Company and plaintiff on or about June 15, 1911, it may be said that the contract referred to in said lease was one entered into between said brewing company and plaintiff on April 22, 1912, which contract provided that the said brewing company agreed to sell and deliver to plaintiff at the premises in question, for a period of six years, certain brands of beer, and the plaintiff agreed to purchase all the beer he would sell or use or consume, in his saloon business at the premises in question, exclusively during the period of six years, commencing May 1, 1912 and ending April 30, 1918; and agreed to pay for said beer certain prices, depending upon the quality of beer furnished: the quality and price being set out in detail in said contract. Plaintiff also agreed to purchase, under said contract, bottle beer brewed by the Atlas Brewing Company, at the current market prices therefor. The contract, however, provided that "the party of the second part (meaning plaintiff) may sell any of other popular brands of bottled beer."

The lease in question was offered and received in evidence. Plaintiff then offered the contract referred to - namely, the one entered into between the Atlas Brewing Company and the plaintiff, and which the plaintiff contended defendant had assumed by virtue of paragraph 10 in the lease aforesaid. In making this offer, plaintiff stated that he would prove by competent testimony that there had been a breach of the covenants in the lease, because defendant had failed to purchase all beer used in the saloon conducted in the premises in question, from the Atlas Brewing Company, as provided for under the contract of April named. Defendant objected to the introduction of the contract. In urging his objection, many reasons were given, but defendant relied in the main upon two, viz.: (1) That the lease was

unilateral and imposed no legal obligation upon the lessees, as there was no agreement on the part of the Atlas Brewing Company to sell the lessees any beer: and (2) that the agreement to purchase beer was an independent covenant of the lessees and not one running with the land or one for the breach of which a forfeiture of the lease might be declared. The court sustained the objection and refused to receive the contract in evidence. In our view of the case, it is not necessary to pass upon the correctness of this ruling on the part of the court, for the following reason: Plaintiff, in his offer of evidence to make competent the admission of this contract, offered to prove, among other facts, that there had been a breach of the contract entered into between the plaintiff and the Atlas Brewing Company, which contract, he contended, had been assumed by the defendant. The offer with reference to this breach was, that the defendant had refused to purchase any bottle beer from the Atlas Brewing Company and had not, in fact, purchased any bottle beer from the Atlas Brewing Company for a period of something like two months. We may assume, for the purposes of this case, that the court should have admitted the contract in evidence. The question then arises, was the offer of evidence submitted as to a breach of the contract sufficient to permit the court to submit the case to the jury? In other words, were there any facts set forth in the offer which proved, or even tended to prove, any breach of contract of April 22, 1912? The clause in the contract which plaintiff claims was breached, while it stated that Wekete should buy all beer used in the premises in question from the Atlas Brewing Company, provided further that with reference to bottle beer, Wekete had the right to sell 50% of other brands of bottle beer. Necessarily this implies that in order to sell, he had the right to purchase other brands of bottle beer, and therefore there was no provision that defendant should use the bottle beer of the Atlas Brewing Company exclusively. As far as the offer of evidence that plaintiff claims tends to show

a breach, there is nothing in said offer which shows that defendant purchased a single bottle of beer from any brewing company other than the Atlas. There is nothing in said offer which shows that defendant sold any bottle beer, whether that of the Atlas or any other brewing concern. The fact that defendant did not purchase any bottle beer for two months from plaintiff does not prove a breach; defendant may have had a sufficient quantity on hand within that two months to meet requirements. He was not required, under the contract, to buy any beer from the Atlas Brewing Company, save what he used upon the premises in question, and that provision contained the condition that as to bottle beer he might purchase elsewhere. In his offer of evidence, the plaintiff utterly failed to set forth any facts which showed a breach of the covenants of the contract of April 22nd. Plaintiff was dependent, in his cause of action, upon proof that there was a breach of said contract. In the absence of such proof, he failed to place before the court any cause of action to be submitted to the jury. The court, therefore, correctly directed the jury to return a verdict of not guilty.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

294 - 20328.

HARRY A. BRAER, Plaintiff in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
FRED GROSCH, W. L. HOFFMAN and OSCAR HEINEMAN, Defendants in Error.	)	OF CHICAGO.

STATEMENT OF THE CASE. Plaintiff in error (plaintiff below) brought suit against defendants in error (defendants below) to recover for the value of services alleged to have been rendered in connection with the sale of certain realty situated at the southwest corner of Armitage and Fairfield avenues in the city of Chicago. Upon the trial before the court without a jury, the plaintiff dismissed as to the defendants W. L. Hoffman and Oscar Heineman; and the case having proceeded against Grosch alone, the court found the issues for the defendant, in whose favor judgment for costs was rendered; to reverse which plaintiff has sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court.

In prosecuting this writ of error, plaintiff includes as defendants therein not only Fred Grosch but also W. L. Hoffman and Oscar Heineman, whom he had dismissed out of the case on the trial below. On December 21, 1914, this court entered an order dismissing the writ of error as to the defendant Heineman. In the brief filed on behalf of the defendants Grosch and Hoffman (by the same attorney), the point is made that the court cannot consider this writ of error with reference to Hoffman because Hoffman had been dismissed from the case on motion of the plaintiff. This contention is well taken; the order of dismissal as to Hoffman is not subject to review, it having been entered on motion of the plaintiff, and he cannot complain of the action of the court taken on his own motion.

This leaves for this court but the determination of the correctness of the judgment with reference to Grosch. On the trial

of the case plaintiff introduced evidence tending to show that he was employed by Grosch to sell the property in question, and that he had called the attention of Hoffman to this property. The evidence further showed that Hoffman eventually purchased the property for the benefit of Heineman. On behalf of the defendant there was testimony tending to show that the defendant had never employed plaintiff to make a sale of this property, and, moreover, that he was not the procuring cause of the sale to Hoffman. At the conclusion of the evidence the court held that plaintiff had not proven his case by a preponderance of the evidence, and therefore found for the defendant. We cannot say that such conclusion of the court is clearly and manifestly against the weight of the evidence.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

31¢ - 20849.

FREDERICK W. GRAPPERHAUS and REGINALD C. RUSSELL, partners as GRAPPERHAUS, RUSSELL & COMPANY, Appellants, vs. JOHN M. TAYLOR, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE PAM delivered the opinion of the court.

This is an action brought in the Municipal court of Chicago by Frederick W. Grapperhaus and Reginald C. Russell, partners as Grapperhaus, Russell & Company, appellants and hereinafter referred to as the plaintiffs, against John M. Taylor, appellee, hereinafter referred to as the defendant, for real estate commissions claimed to be due from defendant in bringing about an exchange of properties between the defendant and one Nicholas Hunt. On the trial below the jury returned a verdict in favor of the defendant, upon which the court entered judgment: to reverse which plaintiff has prosecuted this appeal.

The statement of claim sets forth that defendant was the owner of an apartment building located at 5700-5702 Washington avenue, in the city of Chicago; that in June, 1912, he employed plaintiffs as real estate brokers to sell or exchange said apartment building for him and agreed to pay the plaintiffs 2 1/2 per cent. commission on the value of said building, if a sale or exchange thereof could be brought about through the efforts of the plaintiffs; that in September, 1912, defendant exchanged said building for a building owned by one Nicholas Hunt, which property was known as 4744-4746 Indiana avenue, located in the city of Chicago, and that said plaintiffs were the procuring cause in bringing about the said exchange; that, however, defendant refused to pay plaintiffs the commission agreed upon for said service.

Defendant, in his affidavit of merits, defends as to the entire claim practically upon the ground that the said exchange was not brought about through the efforts of the plaintiff, viz: that the said plaintiffs were not the procuring cause in effecting the said exchange.

The evidence offered on behalf of the plaintiffs showed that during the latter part of April or early in May, 1912, defendant came to the office of the plaintiffs and listed for sale with Mr. Grapperhaus of said firm, the property known as 5700-5702 Washington avenue, upon which there was an incumbrance of $[illegible],000: that it was stated by defendant that he had just started in the manufacturing business and needed money to put into the business, and therefore he wanted to sell or exchange the property: that said plaintiffs worked upon a proposition looking to a sale of the property by way of exchange with certain properties owned by one Nicholas Hunt, situated on Monroe avenue in the city of Chicago: that one of these properties was a six, and the other a three-flat building: that defendant looked at both these properties and said he would exchange his property for the six-flat building, provided Mr. Hunt would guarantee a loan of $15,000 on said building and pay him $5,000 cash in addition: that Mr. Hunt declined to entertain that proposition but would trade his property, which was clear, for the Washington avenue property subject to the incumbrance of $[illegible],000 thereon: that this offer was not satisfactory to the defendant and that about ten days or two weeks thereafter the plaintiffs submitted to him a proposition involving the premises known as 4744-4746 Indiana avenue, also owned by the said Hunt, on which a loan of $14,000 could be secured. Defendant looked at this property, but refused to make a trade unless he received the building clear and $5,000 in cash: that plaintiffs continued their efforts to secure a trade on that basis, defendant all the time insisting upon receiving $5,000 cash, and Hunt refusing to pay that sum as part consideration: that in

June, 1912, Mr. Hunt was called away to Detroit and spent most of the summer away from the city; that when Mr. Hunt returned, plaintiffs again took up with him the proposition where it had been left, and were then told that Hunt had disposed of the property. The evidence further shows that in September, 1912, plaintiffs learned that Hunt had become the owner of the defendant's property known as 6700-6702 Washington avenue; that in a conversation with Hunt they were told that the exchange had been effected through the real estate firm of John A. Carroll & Brother.

The evidence further shows that on August 8, 1912, the said Hunt, in consideration of one dollar and other valuable consideration, conveyed the property known as 4744-4746 Indiana avenue to one C. S. Benfeldt, an employe of John A. Carroll & Brother; that the said deed was recorded on September 6, 1912 in the recorder's office of Cook county; that on September 6, 1912, in consideration of one dollar and other valuable consideration, defendant conveyed to the same C. S. Benfeldt, by warranty deed, the property known as 6700-6702 Washington avenue, which had been listed with plaintiffs, subject to an incumbrance of $22,000; which warranty deed was recorded on September 13, 1912.

The testimony further shows that the property which Benfeldt had received by warranty deed from Hunt was afterwards by him conveyed to the defendant, and the property deeded to Benfeldt by the defendant, conveyed to Hunt. The said Benfeldt, who was called as a witness on behalf of the plaintiff, stated that no money was paid to him or by him, and that he personally had no interest in either of the properties. On cross-examination he testified that the property on Indiana Avenue had been managed by John A. Carroll & Brother for five or six years prior to the transaction in question, and was on the market for sale.

The evidence further shows that the commission claimed to be due, based upon the value of the defendant's property assumed to be exchanged or sold, was ~~$~~ the sum of $1,480.

On behalf of the defendant, evidence was offered that the plaintiffs did not have the exclusive agency for the sale of the property in question; that in addition to plaintiffs, the real estate firms of John A. Carroll & Brother, and Austin A. Parker & Co., had also conducted negotiations looking to the sale or exchange of the property in question.

The evidence further showed that defendant wanted $20,000 for his equity in his property and $6,000 in cash; that John A. Carroll & Brother endeavored to make a deal involving a three-cornered exchange of properties, whereby such sum would be realized; the intended arrangement being that the property of Hunt should be exchanged for the Washington avenue property, and after the transfer had been made, the Hunt property being clear, defendant would be able to realize by way of loan on said property, $15,000; that the property so incumbered should be then traded for a farm in Sandusky, Ohio, on which farm an additional $5,000 could be raised by mortgage; in this way enabling defendant to raise $20,000 by the trade. This arrangement had been agreed upon by defendant, Hunt and the owner of the farm, but was not consummated because the wife of the farmer refused to acquiesce in the arrangement.

John A. Carroll & Brother then made other efforts toward securing the same result for the defendant. The evidence further shows that a trade was finally effected by John A. Carroll & Brother offering to loan defendant the sum of $1,500 cash which defendant needed to meet a note coming due, and to secure a loan of $15,000 for defendant on the Indiana avenue property. The evidence shows that while no commission was charged for securing the loan, defendant paid John A. Carroll & Brother a commission of $1,300 for consummating the deal.

In this state of facts, plaintiffs contend that the finding of the jury for the defendant was contrary to the weight of the evidence; and further complain of the refusal by the court to give an

instruction requested by counsel for the plaintiffs.

The question presented by this evidence is, whether or not plaintiffs were the procuring cause in bringing about the transfer of the property. This was clearly a question of fact for the jury, under proper instructions by the court; and unless we can say that the verdict was clearly and manifestly against the weight of the evidence, the finding of the jury cannot be disturbed.

There can be no question from the evidence, that defendant employed more than one broker who endeavored to secure a sale or exchange of his property. Plaintiffs do not claim to have had an exclusive agency: in fact, they admit they had no exclusive agency. In the case of Baldino v. Hernoberry, General No. 1[illegible], decided by this branch of the Appellate Court, and wherein a petition for certiorari was denied by the Supreme Court, it was held:

> "The principle is well established, that where an owner of property employs several real estate brokers to effect a sale of his property, the broker whose efforts actually bring about the sale is the broker who is entitled to the commission, provided the owner acts in good faith. (Citing Whitcomb v. Bacon, 170 Mass. 479; Sibbald v. Bethlehem Co., 83 N. Y. 378; McGuire v. Carlson, 41 Ill. App. 400; Hubbell v. Meidrich, 14[illegible] Ill. App. 404.) When several brokers are thus employed and one of them sues for commissions, the rule is that even though he proves that he commenced negotiations with a party who subsequently purchased the property, still he is not entitled to recover unless he shows further, by a preponderance of the evidence, that he 'actually brought about a consummation of the sale, or was prevented from so doing by the fraud, procurement or misconduct or fault on the part of the defendant.'" (Citing Day v. Porter, 161 Ill. 8[illegible], 8[illegible].)

In the case at bar the court instructed the jury in accordance with these rules of law. The jury by their verdict were evidently of the opinion that the plaintiffs were not the procuring cause in bringing about a sale of the property in question, and, moreover, that defendant in selling the property through John A. Darrell & Brother and in paying them a commission, was not acting in bad faith. From a careful review of the evidence, we cannot say that the verdict of the jury is clearly and manifestly against the weight of the evidence.

The contention of the plaintiffs, that the court erred in refusing to give a certain instruction requested by plaintiffs, is not well taken, as a reading of the instruction satisfies us that it is not in accordance with the rules of law as laid down by the court in its instructions which properly presented to the jury the law applicable to the facts in evidence.

The further contention of the plaintiffs that the court erred in refusing to admit proper evidence on behalf of the plaintiffs, is also without merit.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

334 - 20684.

SAMUEL ATKINS, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
WILLIAM SMITH, Plaintiff in Error.	)	OF CHICAGO.

STATEMENT OF THE CASE. This suit was brought by Samuel Atkins against William Smith for services rendered in reporting a case wherein defendant was attorney for the plaintiff. On the trial below before the court without a jury, the court found the issues for the plaintiff and entered judgment against the defendant for $18.75, to reverse which the defendant has sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court.

Defendant represented a Mrs. Florence Harris who had a suit pending in the Municipal court of Chicago. Plaintiff (who is a court stenographer), reported this case on behalf of the plaintiff therein. The question is whether the services were rendered for Mrs. Harris or for the defendant. On the trial below, plaintiff testified that he was asked by the defendant to report this case; that the work was done for the defendant, and that he was to look to the defendant for his remuneration; that after the services had been rendered, defendant repeatedly promised to make payment therefor; that bills were rendered to the defendant. Another witness on behalf of the plaintiff testified that defendant had promised to make payment of the amount sued for. Defendant testified on behalf of himself, that he entered into no contract with plaintiff, but that plaintiff performed these services for Mrs. Harris, and that he was to look to the said Mrs. Harris for payment. Another witness for defendant testified to having heard a conversation wherein plaintiff stated that he would look to the aforementioned Mrs. Harris for payment.

The court, in giving its decision, stated that it believed the contract had been made with the defendant, and accordingly entered judgment against the defendant for the amount in question. After a careful review of the record, we cannot say that such finding is clearly and manifestly against the weight of the evidence.

Defendant also contends that the trial court erred in overruling his motion for a more specific statement of claim. We find no merit in such contention.

Defendant complains of the denial by the trial court, of his motion for a new trial based upon newly discovered evidence. The affidavits setting forth this newly discovered evidence show that it was merely cumulative. Moreover, there is nothing in the record to indicate that the defendant, during the trial of the case, endeavored to secure the attendance of these witnesses or asked for a continuance because of their absence. The court therefore properly overruled defendant's motion for a new trial.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

247 - 20377.

ANNA J. SMOLEN, Defendant in Error, vs. MICHAEL ZIEMBA, MRS. MICHAEL ZIEMBA, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 167

STATEMENT OF THE CASE. This is a proceeding brought in the Municipal court of Chicago by Anna J. Smolen, defendant in error and hereinafter referred to as the plaintiff, against Michael Ziemba and Mrs. Michael Ziemba, plaintiffs in error and hereinafter designated as the defendants, for the unlawful taking and converting to their own use of a piano belonging to the plaintiff, of the value of $175. Upon the trial below, before the court without a jury, the court found the issues in favor of the plaintiff and assessed her damages in the sum of $150 and costs, for which amount judgment was entered: to reverse which defendants have sued out this writ of error.

MR. JUSTICE PAM delivered the opinion of the court.

Plaintiff's statement of claim sets forth her demand, which was in the nature of damages for the unlawful taking and converting by defendants to their own use, about May, 1909, of one Meister piano valued at the sum of $175. Defendants, in their affidavit of merits, denied the unlawful taking, and further, set forth that the piano was not converted by them, but was held at the request of the plaintiff; and that, though often requested to remove same, the plaintiff refused to do so. The gist of the action as set forth in the statement of claim and evidence adduced by the plaintiff, was the conversion of the piano in question. While there is a variance in the testimony offered by the plaintiff and the defendants as to how the piano came into the possession of the defendants, under either version it is shown as a fact that the defendants came into possession of the piano lawfully, and that there was no unlawful taking. There

is no evidence of any actual conversion in the form of a claim of ownership by the defendants, or the sale or abuse or destruction of the property: nor is there any evidence of acts amounting to an assertion of dominion over the property, inconsistent with the owner's right. In the absence of any act of this kind, plaintiff was compelled to rely upon the proof of a demand, and a refusal by the defendants to comply with such demand. The court, in entering judgment for the plaintiff, was evidently of the opinion that there was evidence showing a demand for the property and a refusal by the defendants to comply therewith. We, however, have searched the record in vain for any such evidence. The plaintiff's testimony bearing upon this question was as follows: that nearly five years after the piano had come lawfully into the possession of the defendants, she (plaintiff) sent one Novak to secure the return of it: that she was told that when he went there, Mrs. Ziemba (one of the defendants) would not admit him to the house; and that the said Novak did not obtain the piano. In addition, there is the testimony of her father, to the effect that while he was in his own yard, he saw the said Novak go to the house of the defendants, but that he did not see Novak talk to anyone. Novak himself was not called to the stand, nor was his absence accounted for.

Clearly, this testimony offered on behalf of the plaintiff utterly failed to show a demand and a refusal by the defendants to comply with such demand. Moreover, the defendants denied that any demand was made by the plaintiff or by anyone on her behalf. As we view the case, the record is absolutely barren of any competent evidence proving, or even tending to prove, a conversion of the property: therefore, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

445 - 20777.

JOSEPH FRAZER, Appellee,	APPEAL FROM
vs.	CITY COURT
CHARLES KUNTZEMAN, Appellant.	CHICAGO HEIGHTS.

STATEMENT OF THE CASE. This is an appeal from a judgment for $100 rendered in favor of Joseph Frazer, appellee, hereinafter referred to as the plaintiff, against Charles Kuntzeman, appellant, hereinafter referred to as the defendant. The suit was originally brought before a justice of the peace. Upon trial in that court, judgment for a like amount was entered, from which an appeal was taken to the City Court of Chicago Heights, where, upon trial de novo before the court without a jury, the judgment in favor of plaintiff for $100 herein appealed from was entered.

MR. JUSTICE PAM delivered the opinion of the court.

The suit was to recover $100 paid by plaintiff to defendant for rent for the months of May and June, of certain premises owned by defendant, situated on Sixteenth street, Chicago Heights, Cook County, Illinois. At the time the premises were rented to plaintiff, namely, on April 20, 1913, they were occupied by one Mrs. Jennings. Plaintiff claimed that the $100 rent was paid upon condition that the defendant would secure these premises to the plaintiff for occupation by May 1, 1913. Defendant contends that the agreement was that the plaintiff could have the premises as soon as he (plaintiff) "could get Mrs. Jennings out." Upon the issues formed by the various contentions of the parties there were but two witnesses, namely, the plaintiff and the defendant respectively. The testimony of each tended to support his contention. It was shown that a receipt had been issued for the $100 paid as rent by the plaintiff to the defendant. Because the receipt had become lost prior to the trial in the City Court of Chicago Heights, secondary

evidence was offered as to its contents. Plaintiff testified that the receipt stated that it was for rent for the months of May and June, wherein he was corroborated by another witness. Defendant stated that he did not recall the exact contents of the receipt, save that it was for $100. It was further established that Mrs. Jennings did not vacate until May 30, 1913, when the defendant tendered the premises to the plaintiff. Plaintiff, however, refused to accept them because they were not tendered as agreed upon, and demanded the return of the said $100. There was also testimony by the plaintiff that when he refused to take the premises on May 30, 1913, defendant said he would pay back the money paid to him by the plaintiff. This, however, was denied by the defendant.

The entire question in dispute was one of fact. By agreement the parties had waived a jury, and the cause was submitted to the court: therefore, this question of fact was for the court to determine. The court, in entering judgment for the plaintiff, evidently attached greater weight to the testimony offered on behalf of the plaintiff: and after a careful review of the record, we cannot say that its finding was clearly and manifestly against the weight of the evidence.

While a number of other errors have been assigned and argued by the defendant, yet we believe they all resolve themselves into the question whether or not the finding of the court was clearly and manifestly against the weight of the evidence, and we therefore consider it unnecessary to refer to these specifically.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

436 - 20797.

ETHA GALLAY, Plaintiff in error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
AUGUST MATHIS, Defendant in Error.	)	OF CHICAGO.

STATEMENT OF THE CASE. This writ of error was sued out to reverse an order entered September 3, 1914, by the Municipal Court of Chicago in the case of Gallay v. Mathis, which order set aside and vacated a judgment entered by that court June 30, 1914, and granted the defendant leave to file an affidavit of merits instanter.

On June 12, 1912, Etha Gallay, the appellant, hereinafter referred to as the plaintiff, commenced the above entitled suit against August Mathis, the appellee, hereinafter designated as the defendant, to recover damages for personal injuries sustained as a result of being run down by an automobile owned and operated by the defendant. The statement of claim set forth a cause of action. On June 18th defendant filed his appearance in said cause by his attorney, F. J. Canty, and demanded a trial by jury. On June 20th, on motion of the defendant, an order was entered that the time within which to file an affidavit of merits in said cause be extended five days. On June 27th, judgment by default was entered against defendant because of his failure to file an affidavit of merits within the time allowed by the court. On June 29th, a jury was impaneled and sworn, who, after hearing the evidence and arguments of counsel, returned a verdict assessing plaintiff's damages in the sum of $1,000, upon which verdict the court entered judgment. The record further shows that on the hearing, defendant was neither present nor represented. On August 31st - more than 30 days after judgment was entered - a motion was made by the defendant, through his attorney, F. J. Canty, to vacate and set aside the said judgment; and in support of said motion defendant filed an affidavit signed by J. J. C. Glow. This motion was denied by the court. On September 3rd, defendant, by his

attorneys, Grundage, Landon & Holt, filed a sworn petition praying that leave be given the defendant to file an affidavit of merits instanter. Upon the hearing on this petition, both parties being represented, the court entered an order setting aside the judgment and granting defendant leave to file an affidavit of merits instanter; which was the order entered September 3rd, for a reversal of which this writ of error has been sued out.

MR. JUSTICE FARR delivered the opinion of the court.

It is admitted that no motion to vacate was made within thirty days, as provided for under section 21 of the Municipal Court Act, Chap. 37, Hurd's R. S. of Ill. for 1911. After the expiration of the thirty days, the court could acquire jurisdiction in but two ways: (1) by motion to vacate the judgment upon proof of errors of fact not appearing of record - which would be in the nature of a writ of error coram nobis at common law; or (2) by petition in the nature of a bill in equity, showing equitable grounds for vacation of the judgment. Such is the provision of section 21 of the Municipal Court Act, supra. Defendant, in filing his petition of September 3rd for vacation of the judgment (more than sixty days after the entering thereof) endeavored to bring himself within the exception provided in section 21, by setting forth grounds "which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." Plaintiff contends that the said petition failed to set forth such grounds; defendant contends to the contrary, and this necessitates an examination by us of the proceedings leading to the entry of the order complained of.

The first step taken to set aside the judgment was the motion made on August 31, 1914, in support of which the affidavit of J. C. M. Clow was filed. In said affidavit Mr. Clow, after stating that he was connected with the attorney of record in the case and had charge of the defense in said cause, further set forth that no notice had

been served either upon the defendant or his attorney, that a default could be applied for, and that no one was present at the time said default was entered, and that neither defendant nor anyone representing him had notice that the damages would be assessed, or were present on June 20th when the damages were assessed; and that the first knowledge of the default and judgment came to him on August 1, 1914. The record shows that the court refused to set aside the judgment upon this affidavit. Said affidavit contained no statement or explanation why no affidavit of merits was filed within the time allowed by the court; the only reason urged why the motion to vacate was not made within the thirty days as provided by statute, was that the affiant had not learned of the default or judgment until August 1st following. Though information came to the affiant on August 1st, no motion to vacate was made until August 21st, viz., more than sixty days after the entry of judgment. The motion, necessarily, therefore, was based on the statements in said affidavit with reference to the action of the court in entering default, having damages assessed and judgment entered, in the absence of the defendant and without notice to him. The acts complained of were errors of law, reviewable either by appeal or writ of error. Clearly, there was nothing in said affidavit which could have conferred jurisdiction upon a court of chancery to entertain a bill to vacate said judgment.

On September 3rd, the petition sworn to by defendant was filed. An examination of this petition does not reveal any fact therein alleged which could confer jurisdiction upon a court of chancery. It is true, said petition contains the statement that an affidavit of merits had been filed, verified by the aforesaid Cloe as agent of the petitioner, but the petition clearly sets forth that such statement was made upon information and belief. The petition also alleged that the defendant had a good and meritorious defense to the cause of action, but only upon information and belief. In other respects it is but an amplification of the affidavit made by the aforesaid

entertaining a bill to set aside the judgment complained of. Nothing set forth in the defendant's petition of September 3rd accounts for the failure of the defendant to file said affidavit of merits within the time allowed, or explains why the motion to vacate the judgment was not made within the statutory period, viz., thirty days. So far as the record shows, the failure of the defendant to file said affidavit of merits was negligence, as was also his failure to present within proper time a motion to vacate the order of judgment. That we have said with reference to allegations in the affidavit by J. C. M. Clow relative to the fact that defendant had no notice of the entering of the default, the assessment of damages and the entering of judgment, applies to similar allegations in the petition filed on September 3rd. The court on September 3rd, was clearly without jurisdiction to set aside and vacate the judgment entered June 23, 1914, and therefore the order entered by said court on September 3rd vacating the said judgment must be reversed. Miller v. Sarto, 247 Ill. 104; Cramer v. I. C. R. R. A., 260 Ill. 513.

Defendant complains by way of cross-error, that the court erred in defaulting the defendant on June 27th and in entering judgment for the plaintiff on June 29th. He makes the further point that the jury in the case at bar should have been sworn to assess the damages and not to try the issues, and as the jury were sworn to try the issues, the judgment cannot stand. Without passing upon the propriety of these cross-errors, it will suffice to say that the writ of error now before this court is directed to the order of September 3rd vacating the judgment. Our courts have held such petition to be in the nature of a separate suit, and that in such a proceeding an order setting aside a judgment is reviewable by appeal or writ of error. Cramer v. I. C. R. R. A., supra; Barnes v. C. C. Ry. Co., 135 Ill. App. 149. While the cross-errors assigned may be the proper subject matter of a separate writ of error, they are not involved in the issues brought to this court by the present writ of error, and therefore, we cannot consider them.

The order of September 3rd is reversed and the cause remanded to the municipal court with directions to expunge said order of September 3rd from the record.

REVERSED AND REMANDED WITH DIRECTIONS.

495 - 20827.

EDWARD E. BETTS, Appellee,	)	APPEAL FROM
vs.	)	COUNTY COURT
HOMER G. TATE, Appellant.	)	COOK COUNTY.

STATEMENT OF THE CASE. This is an action on the case for fraud and deceit alleged to have been practiced by Homer G. Tate, appellant, hereinafter referred to as the defendant, upon Edward E. Betts, appellee and hereinafter designated as the plaintiff, in the purchase by defendant from plaintiff, of certain real estate valued at $900; the fraud alleged being in inducing plaintiff to accept a note of one Dalbey for $364.25 as part payment of the purchase money for the real estate. On the trial below the jury found the defendant guilty and assessed the plaintiff's damages in the sum of $364.25 plus interest from the date of the note (May 8, 1912). Upon this verdict the court entered judgment against the defendant for the sum of $364.25 and costs; to reverse which the defendant has prosecuted this appeal.

MR. JUSTICE PAM delivered the opinion of the court.

In May, 1912, plaintiff advertised a certain lot for sale. The defendant, who knew the plaintiff, noticed the advertisement in the paper and put himself in communication with the plaintiff with reference to the purchase of said lot. After some negotiations, the plaintiff sold his lot to the defendant for the sum of $900, and as part of the consideration, the plaintiff took from the defendant a note for $364.25 dated May 8, 1912, payable September 8, 1912. The note was signed by one A. F. Dalbey, was payable to himself and indorsed by him.

The declaration in the suit, after setting forth that the property was sold and the note taken as part payment, charges that for the purpose of inducing said plaintiff to sell defendant said property, defendant falsely, fraudulently and deceitfully repre-

sented and stated to the plaintiff that the said H. H. Dalbey, the maker of the note, "was solvent, that he was a great lumber merchant;" that the said Dalbey was "financially responsible," and exhibited "certain credit ratings showing the said Dalbey to be in a sound and strong financial condition," and represented "that said Dalbey was reliable, and would take up and pay said promissory note when the same came due;" that said Dalbey "lived in a fine home in Alanson, Illinois, paid large rent and had a good standing in said community, that his business was in good condition, that he had no outstanding indebtedness or obligations, that said promissory note was given in payment for rugs." The declaration further set forth that plaintiff, because of his faith and belief in the aforesaid representations and statements, and because of his belief in the honesty and fairness of the defendant, sold his property to the defendant on May 28th and received said note at its face value, in part payment. The declaration further charges that the aforesaid statements and representations were false and untrue, that at the time statements were made defendant knew said Dalbey was insolvent and unable to meet the note when it fell due, and that Dalbey at the time was indebted to others in large sums, aggregating $5,000, in addition to being indebted to the defendant in the sum of $1,200. The declaration further charged that the consideration for said note was money advanced; that said note, though overdue, had never been paid, and that by reason of the premises, the plaintiff was deceived and defrauded by the defendant. Defendant pleaded not guilty. Plaintiff contends that the evidence in the case sustained the charges set forth in the declaration. Defendant denies such contention, and further maintains that the evidence shows that the plaintiff did not rely upon any statement made by him; that it in fact negatives such reliance; furthermore, that whatever statements were made by defendant were made in good faith. Defendant also contends that there is no proof of the amount of damages, if any, suffered by the plain-

tiff; that the court admitted improper evidence and refused proper instructions tendered.

There were but three witnesses, namely, the plaintiff, the defendant, and L. H. Dalbey, whose testimony was taken by deposition, on behalf of the plaintiff. Plaintiff, who was superintendent of transportation of the Chicago & Northwestern Railway, testified that he had known defendant for several years prior to the transaction in question; that they both lived in Evanston, about two blocks apart; that in the negotiations looking to the sale of the property, defendant asked plaintiff to take the Dalbey note; that plaintiff then asked him if he would indorse the note, to which defendant replied in the negative, stating that he could not do so because of the rules of the company with which he was associated, but that the note was perfectly good, as he knew the maker; that defendant then submitted to him certain commercial ratings, which consisted of a Dun commercial report and two letters which had been received by the defendant, which had evidently been written in response to a request for information as to the responsibility of the said Dalbey; that defendant then asked plaintiff to investigate the man further, which plaintiff said he would do, and that in pursuance of his investigations, interviewed one Jones, treasurer of the Chicago & Northwestern Railway, being the company with which plaintiff was employed, said Jones being a neighbor of the said Dalby; that Jones informed him that he was acquainted with Dalbey; that his (Dalbey's) family was living in comfortable circumstances; that the house in which Dalbey lived in Glencoe rented for about $100 per month, and that he thought the man was all right; that plaintiff thereupon called up defendant on the telephone and asked what was the consideration for the said note, whereupon he was told the consideration therefor was rugs sold by defendant to Dalbey; that plaintiff then replied he would take the note; that thereafter the transaction was closed and the note in question taken by plaintiff; that several months there-

after he was informed that Dalbey was leaving Glencoe because of debts due and owing, that his property was being attached, and that he was going to Montana: that he immediately communicated with defendant by telephone and charged him with knowledge of this situation: that he charged him with trying to put over a deal upon him, and that defendant replied there must be some mistake about it, that the man would still pay the note: moreover, that the note was good and would be paid: that there was considerable bitterness indulged in over the telephone, and that the conversation was ended by defendant hanging up the telephone receiver. Plaintiff further testified, that he relied on defendant's statement that the consideration for said note was the sale of rugs: plaintiff further testified that defendant said he had had business relations with Dalbey, that he considered him sound and solvent in every way: furthermore, that he accepted the note because of the representations made to him by the defendant as to Dalbey's responsibility, and because the defendant was a neighbor of his.

Plaintiff, in his declaration, first charges the defendant with having represented that Dalbey was solvent. The evidence, as given by plaintiff, shows that at best, what defendant stated was that he considered Dalbey solvent: nor is there any evidence in the case that Dalbey was insolvent. It is true, there was hearsay testimony that he was leaving Glencoe, that his property had been attached and creditors were pursuing him, but such testimony is without force in determining the issues presented here. Moreover, while it is further true that this note was not paid when presented, yet there is no evidence to show that said note could not be collected by suit or by being presented again. On the contrary, there is evidence that another note made and given by Dalbey at the same time and due the defendant, had been paid since the note in question had matured. Plaintiff then charged that defendant had represented to him that Dalbey was a great lumber merchant, that he was in a sound and strong

financial condition and was able and would take up the note when due. The only evidence to prove this allegation is again the statement by plaintiff that defendant told him he considered Dalbey solvent and that he would take up the note at maturity. The testimony of the plaintiff shows that at the same time the defendant asked plaintiff to look up Dalbey, and gave him the mercantile agency report and the two letters previously referred to. There was no evidence of any kind showing that defendant gave any facts or figures with reference to Dalbey's financial responsibility, save the commercial rating and the letters, and his own statement that he considered Dalbey good and that the note would be paid. While plaintiff charges defendant with knowledge that Dalbey was insolvent and indebted in the large sum of [illegible],000 and that defendant knew Dalbey had had business reverses and was being harassed by his creditors, yet the record is barren of any evidence showing or even tending to show that such knowledge was possessed by the defendant, prior to the transaction in question, save in one regard, namely, that the defendant did have one other note of Dalbey's, which the evidence shows, however, has since been paid. The only testimony there is in the case with reference to the amount of Dalbey's indebtedness at about the time he left Glenoce, is the testimony of Dalbey himself, in the deposition taken on behalf of the plaintiff in the cause, in which Dalbey also states ~~xxxx~~ he was indebted to defendant in the sum of about $1,000, but said Dalbey in the same deposition stated that defendant did not know of any troubles that he (Dalbey) had had until early in June, when he informed defendant he did not think he would be able to meet the note when it fell due. This was at least two weeks after consummation of the transaction between plaintiff and defendant. And Dalbey further stated that at the time of giving the note he did not owe to exceed $4,000; that when he gave the note he intended to meet it on September 3rd; and that he did not take up same at maturity because certain contracts had not turned out as expected.

The declaration further charges that defendant represented that Dalbey's business was in good condition and that he had no outstanding indebtedness or obligation. There is no evidence in the record which shows defendant made any such statement. The only evidence of the condition of Dalbey's business was that which appears in the testimony of Dalbey himself, to which we have just referred.

The other allegation as to the false representations is that the defendant stated that the note was given for rugs. The only evidence on that point to support the plaintiff is the evidence of the plaintiff himself. Plaintiff contends that, had he known this note was given for money instead of rugs he would not have accepted said note. In support of this contention he argues that those notes were given by Dalbey because of fraud practiced upon the defendant by Dalbey. There is no foundation for such argument in the record. Dalbey's testimony shows that the rugs were part of the consideration for those notes.

Defendant testified that he made no representation that Dalbey was solvent, that he asked plaintiff to make his own investigation, and that plaintiff did so; that he submitted to plaintiff the same information which he himself possessed; that he had transacted business with Dalbey to the extent of forty or fifty thousand dollars; that all previous obligations of Dalbey had been met; that this note was one of two that had been given to meet an indebtedness which had arisen because of a mistake made by a foreman of Dalbey's in erroneously shipping two cars of lumber to Cleveland instead of Chicago; that he had no knowledge of any indebtedness of Dalbey's, save these notes; that he submitted to plaintiff the mercantile agency report and the letters, and plaintiff took them, stating he would look them over and let him know; that about a week thereafter he received the following letter:

"Chicago, May 23, 1912.

"Mr. Homer Tate,
c/o Union Coml. Co.,
137 W. Washington St., Chgo.

My dear Mr. Tate:

I return herewith the papers relative to the Ernest H. Dalbey note. I have consulted with a friend who lived at Glencoe, with reference to this gentleman, and have come to the conclusion that I will be willing to take this $500 note on the lot. The lot is the first one west of the house built by Miss Jewell. In other words, it is between Miss Jewell's house and the house owned by Mr. McClowry.

Yours very truly,
E. E. SMITH."

That the first he knew with reference to Dalbey's departure from the city was when he was called up by plaintiff's attorney; that he thereafter talked with plaintiff over the telephone, wherein plaintiff made certain charges against him to which defendant objected, and he (defendant) ended the conversation by hanging up the receiver.

While plaintiff maintains that this evidence shows that the defendant had made representations which were false and which defendant knew to have been false, and that he (the plaintiff) relied on these representations in accepting the note, we fail to find any evidence even tending to show that the defendant made any material false representations. Moreover, there is nothing in the evidence from which it can be argued and from which this court can conclude that there were facts in defendant's possession with reference to Dalbey's condition which he had concealed from plaintiff. Furthermore, the evidence clearly shows that such representations which the plaintiff charges to have been false were not relied upon by him. The evidence as it appears in the record, clearly shows that the plaintiff made his own investigation and acted thereon. While, in answering a question calling for a conclusion, he states otherwise, yet the facts in evidence demonstrate the contrary. On cross-examination, the record shows the following testimony was given:

"Q. What did Mr. Cate tell you at your first interview about looking Dalbey up? A. He told me to investigate him.

Q. See whether he was good or not? A. Well, naturally.

Q. Did he tell you what Dalbey's business was? A. The letters disclosed that.

Q. You knew then that he was in the lumber business? A. Yes, sir."

Plaintiff further stated that he consulted with an intimate friend and an associate of his, who was a neighbor of Dalbey's in Glencoe, namely, the Mr. Jones previously referred to, who not only verified defendant's statement as to Dalbey's manner of living, but also was of the opinion that Dalbey was reliable. Although plaintiff contends that the transaction was closed when he telephoned defendant as to the consideration for this note, he was told it was for rugs, yet the evidence shows it was determined by the letter written to the defendant by the plaintiff under date of May 25, above set forth. In said letter plaintiff stated he returned the papers with reference to the Dalbey note (presumably the mercantile agency report and the letters from men with whom Dalbey had done business, which letters indicated that the writers thereof believed that Dalbey was reliable and trustworthy); and further stated that he had consulted with a friend with reference to the gentleman (meaning Dalbey), which friend the evidence showed to have been Mr. Jones, and had come to the conclusion that he was willing to take this $318 note, presumably because, as plaintiff had already testified, his associate and friend, Jones, had told him Dalbey was reliable.

In our opinion, the evidence in this record not only clearly shows no material false representation was made, but that the plaintiff did not rely upon such statements as had been made, but sought information of his own and acted thereon. Therefore we believe the verdict of the jury was clearly and manifestly against the weight of the evidence. In this view of the case it is not necessary to discuss the other errors assigned and argued by the defendant.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

[illegible]

807 - 20940.

WILLIAM C. GORMAN, Appellant,	)	APPEAL FROM
vs.	)	CIRCUIT COURT
MAY GORMAN, Appellee.	)	COOK COUNTY.

STATEMENT OF THE CASE. This appeal is prosecuted from a decree of the Circuit Court of Cook County, dismissing, for want of equity, a bill for divorce brought by William C. Gorman, complainant, against May Gorman, defendant, on charges of desertion and adultery.

MR. JUSTICE PAM delivered the opinion of the court.

This bill was filed January 8, 1914. Service was had by publication, due proof of which was made, and no appearance or answer having been filed by the defendant, she was defaulted, and complainant's bill taken as confessed. On March 19th the case came up for hearing before the Honorable Adolor J. Petit, one of the judges of the Circuit Court of Cook County. No one appeared on behalf of the defendant. Complainant was called to the stand. His testimony was to the effect that he and the defendant were married April 22, 1904, at Minneapolis, Minnesota; that about March 10, 1905, defendant left complainant's house and stated that she was returning to the home of her mother: that after about two weeks she returned to complainant's home, remaining with him about one week, following which she again left complainant: that at this time, defendant stated to him that she was tired of married life and did not care to live with him any longer; that the complainant thereafter maintained his residence in Minneapolis until May, 1912, when he came to Chicago, and that defendant never returned.

Upon the charge of adultery, complainant testified as to misconduct on the part of the defendant with one May Ackroth, detailing what he saw on one occasion, and further, as to admissions of infidelity made to him by the defendant. After counsel had completed the examination of the complainant, the latter was further

interrogated by the court. In answer to a question by the court, complainant stated that when defendant left him she went to live with her mother, at which time he told her that whatever furniture had been paid for she might take: whereupon the court further examined the witness, who testified as follows:

> "Q. You say you left her? A. She left me.
>
> Q. You testify both ways now. Which am I to believe? A. She left me.
>
> Q. Tell the circumstances of her leaving. A. She left a note one time and said she was going to leave and she left."

We have carefully examined the testimony up to this point, and find no justification for the remarks of the court that the witness was testifying "both ways." Then followed this testimony, given in answer to questions by the court:

> "Q. She had no fault to find with you? A. She never had any fault to find with me.
>
> Q. When did you come to Chicago? A. I came here in May, 1912.
>
> Q. That was when she left you? A. No, she left me in March.
>
> THE COURT: I have no more time to talk to you unless you tell me the truth.
>
> Q. Tell us the truth. The fact of the matter is, you left Minneapolis and left your wife and came to Illinois? A. Yes, sir.
>
> Q. And you left her in Minneapolis and you came to Chicago, that is the truth, isn't it? A. Yes, sir.
>
> THE COURT: Of course it is the truth. The bill is dismissed for want of equity.
>
> MR. MAUER: If the Court please, will you allow the witness to state - - -
>
> THE COURT: I will not allow the witness to state one single thing. The day is coming when this kind of thing is going to stop in this court.
>
> MR. MAUER: Will your Honor allow me to make one statement?
>
> THE COURT: The bill is dismissed for want of equity.
>
> MR. MAUER: I take an exception to that, if the court please.
>
> THE COURT: Step down. You are through."

Upon the answers to the questions about leaving his wife in Minneapolis and coming to Chicago, the court evidently based its action in dismissing the bill for want of equity. These answers, however, were not inconsistent with his testimony that defendant had left him in March, 1905. This is evidenced by his answer to the question by the court, "What was when she left you?" (referring to May, 1912) to which he replied, "No, she left me in March." There can be no question that the witness in his answer, was referring to March, 1905. Furthermore, his testimony showed that a period of seven years had intervened between the time she left him and his leaving Minneapolis to come to Chicago. This was not contradicted, save as the court inferred as much from his answers above set forth. As we view these answers, however, the only logical inference, in view of all the testimony, is that the witness, in answering as he did, clearly meant to say that when he came to Chicago, his wife remained in Minneapolis.

On the following day the matter was again brought before the court, and complainant's counsel again asked permission to introduce additional testimony, not only of the complainant, but of other witnesses, upon the charge of desertion, but the court refused such offer, stating that he would hear testimony only on the question of adultery; to which ruling complainant duly excepted. Complainant then offered in evidence on the question of adultery, the testimony of himself and one witness, Archie K. Robinson. The court, after hearing the testimony, stated that he did not believe Robinson, which left complainant's testimony uncorroborated. Under these circumstances, we cannot say that the action of the court in dismissing the bill for want of equity on the charge of adultery was clearly and manifestly against the weight of the evidence.

After the testimony on the charge of adultery had been offered, complainant again asked for permission to introduce testimony on the charge of desertion, but the court said, "No, I will not

hear him on the question of desertion to prove complainant's own testimony was wrong," and further, that complainant had already taken the stand and testified repeatedly that he went away and deserted his wife. We have searched the record in vain for any evidence which shows, or even tends to show, that complainant testified that he had deserted the defendant. The court was clearly in error in making such statements. The action of the court in refusing additional testimony deprived complainant of the right to present his evidence to sustain the charge of desertion as set forth in the bill of complaint, thereby depriving him of the opportunity of a fair and impartial hearing on his bill. For this reason the decree must be reversed and the cause remanded.

[illegible].

[illegible] - 20899.

CHARLES A. PHELPS, Appellee,	)	APPEAL FROM
vs.	)	[illegible]
THOMAS H. HUNTER, Appellant.	)	COOK COUNTY.

MR. JUSTICE PAM delivered the opinion of the court.

This is an action of replevin brought in the Superior court of Cook county by Charles A. Phelps, appellee, and hereinafter referred to as the plaintiff, against Thomas H. Hunter, in the capacity of bailiff of the Municipal court of Chicago, appellant, who will hereafter be designated as the defendant. On the trial below before the court without a jury, the court found the defendant guilty, and the right to the possession of the property in question in the plaintiff, assessing the plaintiff's damages in the sum of one cent. On said finding the court entered a corresponding judgment; to reverse which the defendant has prosecuted this appeal.

This replevin suit was brought April 30, 1910, to recover certain property then in the possession of the defendant, under a plurias execution issued on a judgment entered in the Municipal court of Chicago on August 17, 1909, for $321.65 and the costs of the suit, in favor of John Sexton & Company in a suit brought by said company against Raymond [illegible]. Peterson and Effie [illegible]. Dano. The declaration of the plaintiff alleged that the defendant wrongfully took and detained a certain ~~property upon for the purpose of this case may be described as a lot [illegible] full [illegible]~~. Defendant filed pleas of non cepit, non detinet, also pleas of justification under the execution ren-

dered on the judgment in favor of John Sexton & Company, hereinabove set forth. There were two other pleas wherein the defendant denied that the ownership in said property was in the plaintiff, alleging that the goods had been the property of Effie E. Lamb and that title had passed to the defendant by reason of an execution issued on a valid judgment against the said Effie E. Lamb. The replication tendered issue on the pleas of non cepit and non detinet, denied that the ownership in said property was in the defendant and claimed title through Effie E. Lamb, and further are denied that the execution pleaded in justification was issued on a valid judgment.

The evidence showed that the execution in question was issued March 22, 191[illegible], and was on that same day placed in the hands of the defendant as bailiff of the municipal court; that the said Effie E. Lamb, one of the defendants mentioned in said execution, had, since the rendition of the judgment, married one Gordon; that on the 21st day of March, 191[illegible], the said Effie E. Lamb Gordon, then living with her husband, executed a chattel mortgage (in the execution of which her husband did not join) upon the household furniture and effects which were the subject matter of the replevin suit, to one Philip [illegible] Roberts, to secure the payment of a certain promissory note bearing the same date, for the sum of $378.[illegible], payable to the order of herself, due one year from the date thereof, and signed and indorsed by herself, which chattel mortgage was recorded on the second day of April, 191[illegible]; that the said note and chattel mortgage were subsequently assigned to the plaintiff herein; that the consideration for the said note and mortgage was money loaned by said plaintiff to Effie E. Lamb Gordon; that the said Doherty was not the real party in interest, being a clerk in the office of the plaintiff; that the chattels mortgaged were the property of the said Effie E. Lamb Gordon prior to her marriage to Gordon in 190[illegible], having

been the subject matter of a chattel mortgage given to the plaintiff in 1908; that this property was levied upon by the bailiff of the Municipal Court on April 28, 1910, under the pluries execution issued on March 30, 1910, and was replevied by Christopher Strassheim, sheriff, on the 30th day of April, 1910, on the writ of replevin issued in the case at bar.

~~The record further shows that~~ The plaintiff offered in evidence the half sheets and the docket of the Municipal court, which half sheets and docket show the following entry:

> "1908 August 17, Sexter. Defts. default. per. serv. dms. ass. by Ct. $281.62. Judg. & costs on afft. of claim."

~~The testimony further shows that~~ This entry was first made on the half sheet and was then transferred to the docket, which entry a deputy clerk of the Municipal court, who was called as a witness, testified was a record of the judgment in the Municipal court.

On behalf of the defendant there was offered in evidence a certified copy of judgment and proceedings in the Municipal court in the case of John Sexton & Company, a corporation, vs. Raymond A. Peterson and Effie E. Lamb, partners in business under the firm name, style and description of Peterson and Lamb. In ruling on the objection of the plaintiff to said offer, the Court said:

> "My best recollection is it was in evidence, but so that there will be no question about it, it may be offered and received in evidence, and the court will hold that it is the same as the recital in the half sheets in the docket of the Municipal court, August 17, 1908, it being agreed that there was only one judgment."

This certified copy was as follows:

"UNITED STATES OF AMERICA.

State of Illinois, }
County of Cook, } ss.
City of Chicago. }

"In the municipal court of Chicago.

"Be it remembered, to-wit; that on the 17th day of August, A. D. 1908, the following among other proceedings were had in said court and entered of record therein, to-wit:

"John Sexton and Company, a corporation, vs. Raymond M. Peterson and Effie M. Lamb, partners in business under the firm name, style and description of Peterson and Lamb.

"No. 85552. Contract.

"This day on motion of the plaintiff the defendants and each of them are ruled to appear herein instanter, and thereupon being three times solemnly called in open court they come not nor does either of them, nor any one of them, but they and each one of them make default, and it appearing to the court that said defendants were each duly served with the summons herein more than three days prior to the return day of said summons and that the time of appearance specified in said summons has passed and that they and each of them are still in default of an appearance, on further motion of the plaintiff it is ordered by the court that judgment be entered against said defendants by default for want of an appearance. Thereupon, the court having heard the evidence and being fully advised in the premises, assesses the plaintiff's damages at the sum of Two Hundred Twenty-one and sixty-three/100 dollars ($221.63.)

"It is therefore considered by the court that the plaintiff have and recover of the defendants the said sum of Two Hundred Twenty-one and 63/100 dollars ($221.63) for its damages and also its costs and charges herein expended and that it have execution therefor."

~~Upon this record,~~ Plaintiff maintains that the only record of any judgment having been entered in the municipal court in the case of Sexton v. Peterson and Lamb, was the entry appearing on the half sheets of the docket, ~~herein:~~

"1908. August 17, Foster. Defts. deflt. per. serv. dms. ass. by ct. $221.63. Judg. & costs on afft. of claim."

that such judgment ~~is~~ not a valid judgment and ~~leaves~~ the execution issued thereon without force; that the title to the property was in the plaintiff by virtue of the chattel mortgage

executed by Effie M. Lamb Gordon, which mortgage, though it covered household goods, was not required to be executed jointly by herself and her husband, "because the evidence showed it was given in the purchase of the household goods in question; that the taking of the property and holding same on this execution, issued upon what the plaintiff ~~is~~ now pleased to call an invalid judgment, was wrongful and therefore the plaintiff was entitled to maintain his action of replevin.

Defendant contends that the chattel mortgage in evidence was given to secure a loan from the plaintiff to the defendant, and that the chattels pledged as security being household goods, it was necessary that both the husband and the wife join in the execution thereof, and that the failure of the husband to join in the execution thereof, rendered the same invalid as against creditors; furthermore, that the judgment upon which the execution issued was a valid judgment, as appears from the certified copy of the proceedings hereinabove set forth; that as the execution thereon was in the hands of the defendant prior to the execution of the mortgage (conceding that the said mortgage was valid) it was a prior lien on the property. While these respective contentions present two issues, viz: (1) was the chattel mortgage relied upon by the plaintiff valid and (2) was the execution pleaded in justification issued upon a valid judgment - in our view of the case, it is necessary to determine only the latter.

The execution in question came into the hands of the defendant as bailiff of the municipal court prior to the execution of the chattel mortgage relied on by the plaintiff. If this execution was based on a valid judgment, the

plaintiffs in said execution (defendants here) obtained a lien prior to that of the plaintiff. This brings us to the question whether or not the execution was issued upon a valid judgment. Plaintiff contends that the only entry of judgment as shown by the record is the following:

> "1908 August 17, foster. defts. defit. per. serv. das. ass. by ct. $221.63. Judg. & costs on afft. of claim."

that in Stein et al. v. Meyers, 255 Ill. 199, it was held that a judgment entered in such an abbreviated form was invalid and that such judgment cannot be relied on to sustain an execution issued thereon. If this record presented no other proof of the judgment referred to, Stein v. Meyers, supra, would apply; but in the case at bar, the defendant, on his own behalf, introduced a certified copy of the proceedings of the municipal court in the case wherein the judgment was entered upon which this execution issued. At the time this offer was made and received in evidence by the court, objection was made by the plaintiff, but the court overruled the objection and received it in evidence, stating at the same time that it was "the same as the recital in the half sheets in the docket of the municipal court, August 17, 1908, it being agreed that there was only one judgment." What, then, was the judgment of the court? Is it evidenced by the entry on the half sheets or is it evidenced by the certified copy of proceedings heretofore quoted, wherein the judgment appears fully and completely set forth? The record, as it appeared on the half sheet, was only a minute or memorandum of the judgment as pronounced by the court at the time it was given. What the judgment of the court was appears in the certified copy of the proceedings introduced in evidence. This very point was the subject matter of a decision by this branch of the Appellate court

in Thos. M. Hunter, Bailiff etc. v. Empire State Surety Co. et al., General No. 20,393, which was a suit to recover on a replevin bond. In the course of the proceedings in that case, the plaintiff (in the suit on the bond) offered in evidence the judgment of the Municipal court of Chicago in the replevin suit in which the bond being sued on was given. The evidence in that case showed that the only record of this judgment made at the time it was entered by the court, consisted of an abbreviated minute of the proceedings entered upon the docket of that court. After suit was instituted on the replevin bond, an order was entered in the replevin suit, which order recited that after due notice and examination of the records and papers filed in the replevin suit, "the court finds that through error and inadvertence, the clerk had failed to record in due form the findings, proceedings and judgment rendered therein on April 7, 1909, and thereupon it was ordered that such findings, proceedings and judgment, which are fully set forth in the order, be entered of record nunc pro tunc, as of April 7, 1909, the date of the entry of the judgment." Upon the trial of the suit on the replevin bond, the record of the judgment in the replevin suit, entered nunc pro tunc, was offered in evidence and admitted. It was maintained that the court erred in admitting said record of the judgment as entered nunc pro tunc. This objection was urged as a cause for reversal of the judgment entered on the replevin bond in the suit. In reviewing the ruling of the court upon the admissibility of the said record of judgment entered nunc pro tunc, this branch of the court said:

> "It is urged that the trial court erred in admitting in evidence the order - called by counsel for plaintiffs in error an 'expanded judgment' - entered in the replevin suit on March 15, 1912. The ground of the objection is that this order was entered 'long

after the court had lost jurisdiction of the replevin suit,' by a judge who did not try the case, and was therefore (it is said) 'a mere nullity.' Counsel for defendants in error objects to the use of the words 'expanded judgment.' We see no harm in using these words to express in brief form what was in fact done at the time the order of March 15, 1912, was entered. When the judgment was pronounced, or 'rendered,' on April 7, 1909, a memorandum, or minute, of that fact was written upon the docket, either by the judge who pronounced it, or by his minute clerk. This memorandum, or minute, while in abbreviated form, is perfectly intelligible to every lawyer or clerk who is at all familiar with court records and minutes. With this minute as a guide, any clerk who is competent to write court records could readily 'expand' it into the technical form of a judgment for the defendant in replevin; and a comparison of the minute with the order of March 15, 1912, shows that the judgment then ordered to be entered of record nunc pro tunc was in fact the judgment actually rendered on April 7, 1909, as shown by the minute.

"There is a clear distinction recognized by the authorities between the rendition of a judgment and the entry of it. 'The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict. The entry of a judgment is a ministerial act which consists in spreading it upon the record or writing it at large in a docket or other official book.' (25 Cyc. 835.) In construing a statute using both these words, our Supreme court said: 'The words 'rendered' and 'entered' are plainly used antithetically, and each in its distinctive correct legal sense, - 'rendered' being used to indicate the giving of judgment, and 'entered' to indicate the act of placing the judgment rendered on the record, - in other words, enrolling or recording it.' (Blatchford v. Newberry, 100 Ill. 484, 486.) The same distinction was pointed out by Mr. Justice Moran, in Jasper v. Schlesinger, 22 Ill. App. 637, in the following language (p. 641): 'It could not be said that there was no judgment because the judgment order had not been spread out at length upon the judgment record. The judgment is a fact from the moment it is pronounced by the court, and the clerk's duty is to record such judgment before the final adjournment of the term 'or as soon thereafter as practicable.' R.S., chap. 25, Sec. 14. In the same opinion it is also said (p. 640): 'It is not the practice of the court in rendering judgment in any case at common law to write out the formal order at length, nor is it the practice for the minute clerk to write out such order in his minutes, but such memorandum is made as clearly indicates what the judgment of the court is.'"

In the case at bar, however, it was not necessary to secure an order showing what the record of the judgment was, and have it filed nunc pro tunc. What the plaintiff in the case at bar considered the judgment was merely a minute or memo-

randum made either by the clerk or the court, of the judgment pronounced by the court. What the judgment of the court in fact was, appeared in the certified copy of the proceedings. And the judgment, as it therein appears, shows it is valid and in proper form: and therefore, the execution issued thereon, coming into the hands of the defendant prior to the execution of the chattel mortgage, created a prior lien on the property levied on in the said execution, as against any claim that the plaintiff had by reason of the mortgage upon the same property. The court, therefore, erred in refusing to hold as propositions of law: first, that the judgment offered in evidence by the defendant as shown by the certified copy of the proceedings in the case of John Sexton & Company v. Raymond M. Peterson and Effie M. Lamb was a valid and binding judgment: and, secondly, that the certified copy of the judgment and proceedings in the Municipal court, offered and received in evidence, was prima facie evidence of the facts therein recited and that such recitals were sufficient to uphold the execution under which the defendant justified the taking of the property in question.

For the reasons hereinabove assigned, the judgment will be reversed, and as the reversal is based on a pure question of law, the cause will not be remanded, but judgment for the defendant will be entered in this court.

REVERSED AND JUDGMENT FOR DEFT.

139 - 20,904.

MARGARETTA KILLHAM, and MABEL KILLHAM, MARY KILLHAM, [illegible], HENRY KILLHAM, SARAH KILLHAM, ETHEL KILLHAM, RAYMOND KILLHAM and ALFRED KILLHAM, Minors who sue by their Mother, MARGARETTA KILLHAM, Appellees,	APPEAL FROM SUPERIOR COURT COOK COUNTY.
vs.	
JAMES CHALOUPKA, Appellant.	1951 I.A. 182

STATEMENT OF THE CASE. This is an action of trespass on the case brought by the appellees, Margaretta Killham, and Mabel Killham, Mary Killham, George Killham, Henry Killham, Sarah Killham, Ethel Killham, Raymond Killham and Alfred Killham, minors who sue by their mother Margaretta Killham as next friend, hereinafter referred to as the plaintiffs, against the appellant, James Chaloupka, hereinafter referred to as the defendant, under the 9th section of our Dram-shop act, to recover damages for injuries to their means of support by reason of the intoxication of George Killham, husband and father of the said plaintiffs, caused in whole or in part by the sale to him of intoxicating liquor by the defendant. On the trial of the case the jury returned a verdict in favor of the plaintiffs for $1,500 upon which the court rendered judgment, to reverse which defendant has prosecuted this appeal.

The evidence offered on behalf of the plaintiffs showed that George Killham, the husband and father of the plaintiffs, commencing in the year 1906, had for five years been employed by the Federal government in the post office department; at first receiving an annual salary of $800, which was gradually increased until the summer of 1911, when he was receiving $1,100 per year; that if the said George Killham had continued in his position another year his salary would have been increased to $1,200 per year; that during said period he was in the habit of frequenting the saloon of the defendant, buying liquor and becoming intoxicated thereby; that by reason of said intoxication

he was, during these various years, absent from his work a great part of the time, during some years being absent as much as two or three months; that according to the records of the post office, admitted in evidence on behalf of the defendant, Killham was absent from work 242 1/2 days, whereby he lost in pay the sum of $354, which record further showed that in the year 1911 alone, up to August 19th, when Killham resigned from the service, he was absent 99 days, 30 of which were immediately prior to his resignation; that the said Killham, when asked why he resigned, testified:

> "Why, I was not able to work. I was - my nerves was all gone from drinking and I thought it best to resign because I thought I would get discharged anyway."

The evidence further showed that it was customary for him to turn all all his money over to his wife, with the exception of a few dollars which he withheld to defray personal expenses; that at the time suit was brought, all the children who are plaintiffs in this action were minors, but that one had become of age prior to the time of the trial of the case; that notice had been served upon the defendant by Mrs. Killham early in 1908 and on several occasions thereafter, not to sell her husband intoxicating liquors; that during the year 1909 Gertrude Ivers, a daughter of George Killham, had read to defendant a notice in writing, not to sell George Killham any intoxicating liquors. The testimony of the plaintiff also shows that from December 24, 1913, up to the trial of this case - May, 1914 - he contributed to the support of the plaintiffs the sum of only $18; that during September, 1913, he was in a place known as the Washingtonian Home; and that Margaret Killham, his wife, and one of the plaintiffs, worked two days each week doing general housework to support herself and family, and was also compelled to accept assistance from the United Charities and the county authorities.

Defendant, testifying in his own behalf, disclaimed any acquaintance with Killham before the spring of 1908, and stated further that while in his saloon, Killham never drank to excess; that

he never at any time sold him enough liquor to produce intoxication, nor did he recollect ever having seen Killham inebriated. He denied having ever seen Mrs. Killham at his place of business or that he had ever received any notice from either her or anyone else, not to sell liquor to the said Killham. He further testified that the first time he received or heard of any such notice was in 1911, about three weeks before the beginning of this suit, when defendant's partner, one Taluzek, told him that notice had been given, following which no more liquor was sold to Killham.

Taluzek, the partner, testified that Killham never took more than a few small drinks at any one time, and that he never saw Killham intoxicated either in the saloon or elsewhere, and that the first time he received notice not to sell Killham any liquor was in August, 1911. Another witness, who at one time tended bar in defendant's place for about three weeks, and who lived in the neighborhood, stated he had never seen Killham drink to excess in the saloon of defendant, nor had he ever seen him intoxicated at any time, but that he had often seen Killham take two or three small drinks of liquor in the morning.

Upon this evidence, and under the instructions given by the court, the jury returned the verdict complained of on this appeal.

MR. JUSTICE PAX delivered the opinion of the court.

Defendant first contends that there is no evidence in the record tending to prove that the minor children were dependent upon the said Killham for their support, wherefore the court should have instructed the jury to find the defendant not guilty. As we read the record, this point is not well taken. The evidence clearly shows that those children, all of whom were minors, save one daughter who became of age after the commencement of this proceeding, were the children of the said Killham. Even though the mother was able to support them herself, yet her husband was under a legal obligation to support his wife and minor children. If the claim had been made that there was no evidence

that they suffered in their means of support because the said Killham had not been contributing to their support, another situation might arise, but there is ample evidence in the record that Killham had been regularly turning over his salary to his wife, who devoted it to the maintenance of the household. Our dram-shop act was intended to protect the family of a drunkard against immediate or probable want of adequate support. The children, constituting part of Killham's family, were entitled to the benefits conferred thereby. Graham, et al. v. Sankey, 133 Ill. 634; Peel v. Heiligenstein, 244 Ill. 289.

Defendant next contends that the court erred in excluding evidence that Killham, during the period in question, frequented other saloons in the neighborhood. In his brief and argument defendant admits that such testimony could not be offered as a defense against the action but insists that it is material and important on the question of actual damages, and on the further question whether or not exemplary damages should be awarded. The further point is made that such evidence would have tended to corroborate his testimony that Killham never frequented his saloon before the year 1909, and defendant maintains that the jury, with such evidence before them, might well have concluded that defendant was in no way responsible for Killham's intoxication during the years 1904, 1907 and 1908. It might be well to observe, in connection with this point as made by the defendant, that the defendant did admit that Killham commenced to drink in his saloon in 1909. The evidence offered by himself, by way of the records of the post office department, showed Killham was absent for other than regular vacations allowed by that department, 242 1/2 days, 151 of which were after the year 1909, and that of the total sum of $654 lost by reason of these 242 1/2 days of absence, $441 was lost during the years 1910 and 1911. It is clear, therefore, that the greater amount of damages was suffered after 1909. This point, however, was not made at the time of the trial. Defendant contented himself with the broad claim that the mere circumstance of Killham's frequentation of other saloons was a proper subject

matter for consideration by the jury in assessing the damages. This is further evidenced by the instruction offered to the same effect which, however, was refused, and no point has been made in the brief that the court erred in the refusal thereof.

Under the facts in this case, such evidence cannot be considered either as an absolute defense or in mitigation of the damages, because under our Dram-shop act plaintiff had the right to sue either one or all of the persons who sold her husband intoxicating liquors, if there was more than one, and a recovery and satisfaction by a party injured against one constitutes a bar to a recovery against another who may have contributed in causing the same intoxication. By the 9th section of the Dram-shop act, if more than one dram-shop keeper furnish intoxicating liquor, the liability therefor is not to be apportioned among them, but each person who assisted in bringing about the habitual condition of intoxication would be liable for the acts of all persons who contributed thereto by furnishing intoxicating liquors. Corp. v. Lilly, 217 Ill. 582. This principle just set forth, and the further one that the recovery and satisfaction against one constituted a bar against another who may have contributed in bringing about the same intoxication, is clearly set forth in Emory v. Addis, 71 Ill. 273, (p. 277):

> "It will avail appellant nothing that it is shown other persons sold Addis liquors that may have contributed to his intoxication. Legally and morally they may be as guilty as he, or even more so. The statute, however, has given an action to the party injured, 'severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused intoxication, in whole or in part, of such person or persons.'
>
> "The statute is broad and sweeping in its provisions, but the wrongs it is intended to prohibit can only be prevented by the rigid enforcement of highly penal laws. He who deliberately sells that which he knows will inflame the passions, deprive the party of the control of his judgment, and render him, for the time being, incapable of exercising proper care for personal safety, or that of his property, must be prepared for the consequences that may follow. One risk incident to the traffic is, by the statute, he is made responsible for all the injuries such persons may inflict.
>
> "But there can be but one recovery for an injury done under this statute. A recovery and satisfaction by a party injured against one, would constitute an effectual bar to any recovery against another who, 'in part,' may have contributed to cause the intoxication of the person who committed the injury. The

party injured may elect to proceed severally or jointly against the persons who cause the intoxication, but he can have but one satisfaction for an injury."

A situation may arise wherein evidence of this kind might be admissible, but under an entirely different state of facts, as in Hackett v. Smelsley, 77 Ill. 100, wherein the following instruction was given (p. 118):

"The jury are instructed that if they believe, from the evidence, that, in the years 1871, 1872 and 1873, the plaintiff visited public beer-gardens, club-rooms and halls, where numbers of persons were assembled together, and attended picnics, and that her husband accompanied her to said places, and at said places, or some of them, the plaintiff and her husband drank beer and wine together in the presence of the defendants, or some of them; and if the jury further believe, from the evidence, that the husband of the plaintiff kept wine and beer in his house, and that the husband of the plaintiff, with the knowledge and approval of the plaintiff, drank such wine and beer at home, and that the plaintiff and others joined him in drinking such wine and beer; and if the jury further believe, from the evidence, that all said drinking of wine and beer was done with the knowledge and approval of the plaintiff, then, and in such case, said facts, if proven, may be taken into consideration by the jury, together with all the other evidence in the case, in determining the damages of the plaintiff, if the jury believe, from the evidence, that the plaintiff is entitled to a verdict in this case."

In that case the court permitted such an instruction because of the peculiar facts in the case, and the reason therefor is at once evident, viz., the fact of the husband's drinking in other places was known to his wife, and under circumstances that indicated that she approved thereof. Therefore, in a suit brought by the wife under the Dram-shop act, such facts were properly admitted in evidence as having a bearing upon the question of damages; but such facts do not appear in the case at bar. On the contrary, not only is there a lack of evidence of any kind that the wife approved of the husband's intemperate habits in other saloons, ~~xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx~~ but it clearly appears that the wife at all times, so far as this record shows, objected to the sale of any and all intoxicating liquors to her husband. Clearly, therefore, under the facts in this case, such testimony was inadmissible.

Defendant further complains that the court erred in the giving of certain instructions on behalf of the plaintiff. He complains of instructions 7 and 38 because therein the jury were at liberty to allow damages arising after the commencement of the suit. His contention is predicated upon the fact that two years prior to the trial of the case one of Killham's children married and was therefore presumably no longer dependent upon her father's support, consequently the instructions should have been qualified to allow only such damages as accrued, after the commencement of the suit, to all the plaintiffs jointly; and that the failure to so modify these instructions was prejudicial error, since thereby the jury had the right to feel free under the instructions as given, to award damages accruing after the commencement of the suit, even though they were suffered by only a part of the plaintiffs and not by all. This precise point, however, was passed upon in Peters v. Kamiczaitis, 101 Ill. App. 574. Mr. Presiding Justice Waterbaugh in that case said (p. 576):

> "The sole ground urged for reversal is that the plaintiffs, the several minor children of Frank Lederle, deceased, can jointly recover only for such loss to their means of support as accrued from the time of the death of their father until the oldest of the children reached his majority: in other words, that having elected to sue jointly, which they had a right to do, their recovery must be confined to the period during which each had an equal interest in the whole of the recovery. We are of opinion that such position is unwarranted and unsupported by any reasonable construction of the Dram-Shop statute. The plaintiffs had the right to sue jointly for and recover all damages sustained by them on account of the cause of action stated in the declaration. It was for the jury to determine from the evidence the full extent to which each and all of them were damaged by reason of the death of their father, and to return a verdict for the gross amount. It is a matter of no concern to the defendants how or in what proportion the proceeds of the judgment be divided among the joint plaintiffs." (Italics ours.)

I agree with this reasoning. Apparently the Supreme Court also approved thereof, as they denied a writ of certiorari in said case.

Defendant also complains of instructions 14 and 32, claiming that therein the jury were told that although the evidence as to damages resulting from injury to the plaintiffs' means of support were indefinite, still "the jury shall establish the damages from such

evidence pertaining thereto as is before them." It is contended that such language permitted the jury to "speculate as to the amount of the damage, if any, suffered by the plaintiff, and dispensed with that definiteness in proof which was requisite to enable the plaintiff to properly make out a case of damages." While we cannot approve of this instruction, yet in view of the many instructions given by the defendant on the question of damages, we cannot say that the defendant suffered any harm by the giving of it. Moreover, the amount of the verdict which the jury returned, in view of the evidence in the case, does not show that they indulged in any speculation. There was actual proof of a money loss by reason of time lost, of $654. Although no one testified in so many words that Killham had been idle from the time he resigned his position of employment until the time of the trial in May, 1914, there is evidence from which it can be reasonably inferred that at least for a considerable portion of that time the said Killham did not work and that he continued in his habits of intoxication. The testimony of the wife showed that from December, 1913, to May, 1914, her husband contributed only $18 to her support; that in September, 1913, he was an inmate at the Washingtonian Home, a well-known institute for inebriates. Keeping in mind that if Killham had continued in the service of the post office department he would have received a salary of $1,200 per year after 1911, it might be reasonably inferred from such evidence that from the time of the commencement of the suit and prior to the time of the trial in May, 1914, the plaintiffs suffered actual damages sufficient to warrant the amount of the verdict which the jury returned.

Defendant complained of instruction 23, which is as follows:

"The court instructs the jury that if they find from the evidence that plaintiff, Margaretta Killham, did serve notice on defendant, or any of his agents, asking defendant not to sell liquor to her husband, George W. Killham, and that defendant failed to comply with said notice, then if you find from the evidence that plaintiffs are entitled to damages you may assess exemplary damages for the failure of defendant to comply with said notice."

Defendant contends: "Under this instruction, if the jury found that the plaintiffs had suffered actual damages prior to the giving of the notice, and had then found that notice had been given and disregarded, but that no actual damages had resulted after the giving of the notice, they would nevertheless be free to award exemplary damages. This we maintain is not the law. The instruction would only have been proper if it had been so modified as to instruct the jury that if they found from the evidence that any actual damages had accrued by reason of sales made in defiance of the notice, then exemplary damages might have been awarded." We do not so read this instruction. On the contrary, the instruction clearly states that if after notice had been served defendant failed to comply with said notice then, if they find from the evidence that plaintiffs are entitled to damages they may assess exemplary damages. The omission of the word "actual" before the word "damages" could not have misled the jury. Naturally the jury must have understood from the word "damages" something different from exemplary damages, and necessarily it could only have meant actual damages. The same interpretation was given to a similar instruction in McMahon v. Sankey, supra.

Defendant also complains of instruction 9, because therein the jury were told that there could be a recovery for injuries to the person as well as to the means of support of the plaintiffs. While he does not contend that the instruction is bad as an abstract proposition of law, he urges that it is erroneous in the case at bar because in the declaration there is no claim for injuries to the person of the wife or children, therefore no recovery could be had for any injuries to the person. In the course of the trial a question was asked, and answered from which an inference might have been drawn that Mrs. Gilliam sustained injuries to her person, but this testimony was stricken out upon the ground of being immaterial and irrelevant under the issues. Considering the fact that in 18 instructions given - 9 on behalf of the plaintiffs and 9 on behalf of the defendant - relating to the question of damages, the court charged the jury that the plaintiffs could recover damages only

to the means of support, and that the defendant was not harmed by the giving of this instruction. In fact, we having already held that the verdict represented only actual damages sustained by the plaintiff, we are therefore of the further opinion that none of the instructions with reference to the damages complained of by the defendant was harmful to the defendant and that the jury did not in their verdict include any damages either exemplary or to the person. In this view of the case, we regard the defendant's further contention that the verdict is excessive, as not well taken.

There remains only the contention by the defendant that the verdict is manifestly against the weight of the evidence. The question whether the plaintiffs were injured in their means of support by the intoxication of the husband and father, produced in whole or in part by intoxicating liquors sold him by the defendant was one of fact, on which there was conflicting evidence. The rule is well settled that where there is a conflict in the evidence, the verdict of the jury on questions of fact in controversy cannot be disturbed unless we can say that such verdict is manifestly and clearly against the weight of the evidence. This, however, we are not able to do.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

10 - 20948.

In re Petition of A. O. WITZKE, Appellant,

vs.

FREDERIC DREER, Appellee.

APPEAL FROM COUNTY COURT COOK COUNTY.

1951 A 206

STATEMENT OF THE CASE. On the 8th day of November, 1918, there issued from the Municipal Court of Chicago a writ of replevin on behalf of Frederic Dreer, appellee, and against A. A. Armstrong and A. O. Witzke, the latter being the appellant, for the recovery of one Ford five passenger touring automobile. The property was not recovered upon this writ but on the 20th day of November thereafter, in the same action, plaintiff filed a statement of claim in the usual and customary form used in an action of trover, alleging damages in the sum of $275. ~~As reference will necessarily be had to~~ The statement of claim ~~in the course of our opinion, we set it out in full:~~

"Plaintiff's claim is that the plaintiff on to-wit, on or about the 15th day of June, A.D. 1918, was lawfully possessed as of his own property of certain goods and chattels, to-wit, one Ford five passenger touring car, of the value of two hundred and seventy-five dollars ($275.00), and being so possessed thereof the plaintiff afterwards, to-wit, on the day aforesaid, there casually lost the said goods and chattels out of his possession, and the same afterwards, to-wit, on the same day, there came to the possession of the defendants by finding; yet the defendants, well knowing the said goods and chattels to be the property of the plaintiff, has not as yet delivered the same, or any or either of them, or any part thereof to the plaintiff, although often thereto requested, but has hitherto refused so to do, and afterwards, to-wit, on or about the same day, there converted and disposed of the said goods and chattels to his own use, to the damage of the plaintiff of two hundred and seventy-five dollars ($275.00)."

To this statement of claim defendant filed an affidavit of merits, setting forth in substance, that he became the purchaser of the said automobile at a public sale held by the bailiff of the Municipal Court of Chicago under a writ of execution issued by the said Municipal Court. Upon the conclusion of the trial, plaintiff presented a motion in writing to instruct the jury to find the issues in his favor, which motion was accompanied with the following instruction:

"The court instructs the jury to find the defendant guilty and assess the plaintiff's damages at the sum of two hundred and seventy-five dollars ($275) in trover." (italics ours.)

he court, however, refused to direct a verdict in that form, but gave he jury the following form of verdict with directions to sign same:

"We, the jury, find the defendants, F. S. Armstrong and H. C. Witzke, guilty of having maliciously, wilfully and intentionally, and with intent to injure and defraud the plaintiff converted to defendants' own use, the goods and chattels of the plaintiff and assess the plaintiff's damages at the sum of two hundred and seventy-five ($275)."

hich was returned by the jury and judgment rendered thereon by the ourt. Said judgment and costs not having been paid, a capias ad satisaciendum was issued and served upon the defendant. Upon this writ defendant, upon his failure to satisfy said writ, was taken into custody. n the same day he filed his petition for release from such arrest, nder the Insolvent Debtors Act, and was released upon furnishing a ond conditioned upon his appearance on the hearing of said petition. n the hearing before the court all the papers in the original replevin uit were produced, viz.: the affidavit, writ and bond, plaintiff's tatement of claim, which was in the customary form of an action in rover, defendant's affidavit of merits, the motion for a directed verdict presented by the plaintiff, the form of verdict as set out in said ction, also the verdict returned by the jury at the direction of the ourt, and the judgment issued thereon. Upon this state of the record efendant asked the discharge of the defendant on his petition, insisting ~~xxxxxx~~ ~~xxxxx~~ that malice was not the gist of plaintiff's action. Plaintiff aintains the contrary, insisting that trover is an unlawful conversion f property and that the verdict of the jury found defendant guilty of aving maliciously, wilfully and with intent to injure and defraud the laintiff, converted to his own use the goods and chattels of the plaintiff, and that judgment having been rendered thereon, said judgment ~~is~~ res adjudicata on the question whether malice is or is not the gist of he action. The court in denying defendant's petition, was of the opinion that malice was the gist of the action, and upon that ground remanded

defendant to the custody of the sheriff, which action of the court is complained of on this appeal.]

MR. JUSTICE PAM delivered the opinion of the court.

The principle is well established that the question whether malice is the gist of an action must be determined from the face of the record, where the record affords the means of such determination: and our courts have further held that if it appeared from the pleadings that malice was the gist of the action, the doctrine of res adjudicata could apply. Jernberg v. Six, 186 Ill. 284. The further principle of law is well established, that the gist of an action in trover is the conversion of the property. Chitty on Pl., 15th Am. Ed., Vol. 1, P. 146. All that need be shown in a count sounding in trover is: the ownership of the property in the plaintiff, that it came into the possession of the defendant, and that the defendant converted it to his own use. In the case of Ettinger v. Norton, 131 Ill. App. 531, the court said that the declaration therein averred no facts showing any evil or fraudulent purpose to inflict an injury or wrong upon the plaintiff, therefore making it unnecessary, under said declaration, to show any evil intent or purpose; that the declaration was the equivalent of a count in trover; that to sustain such count it was only necessary for the plaintiff to show ownership of the property, that it came into the possession of the defendant, and that he converted it to his own use, and therefore held that malice was not the gist of the action: citing Jernberg v. Six, supra, wherein it was categorically held that malice was not the gist of an action in trover. It has been uniformly held that when malice is not the gist of the action, the filing of a petition in compliance with the provisions of the Insolvent Debtors Act entitles defendant to his discharge. First Natl. Bk. of Flora v. Burkett, 101 Ill. 541: Aitson v. Parsell, 16 Ill. 327: Miller, Stimson & Co. v. Norton, 228 Ill. 364.

The facts in the case at bar show that after the plaintiff had ailed to secure the return of the property under his writ of replevin, e filed a statement of claim alleging damages for the conversion of the roperty, an examination of which shows that it is in the form of an action in trover, as laid down by Chitterbaugh's Pleading and Practice, 8th Ed. . 303. That plaintiff regarded his statement of claim as an action in rover may be seen from the form of verdict submitted by him to the ourt; and only in the verdict itself - which the court directed the ury to return - is there found a charge of fraud or malice. The verdict, owever, cannot supply the element of malice or fraud unless they appear n the statement of claim either expressly or impliedly.

Plaintiff contends that the statement of claim is not controlling, ut that the verdict and judgment are, and cites in support thereof dgerton v. C. B. I. & P. Ry., 240 Ill. 511. We are of the opinion, however, that the ruling in that case is not applicable to the facts in the ase at bar, but that the holding in the more recent case of Silman v. hicago Railways Company, 240 Ill. 305 (advance sheets) is in point, in hich case plaintiff did file a statement of claim in writing, but the ourt held that such statement of claim did not sufficiently state a cause f action upon which to sustain a verdict of "guilty" upon which judgment as entered. As in the case at bar, appellee in that case relied upon dgerton v. C. B. I. & P. Ry. Co., supra, in support of his contention. n passing upon this contention the court said (p. 310):

> "It was not intended to annul the provisions of that section (section 40, which required written pleadings in fourth class cases,) and in the later case of Walter Cabinet Co. v. Russell, 240 Ill. 418, we held that the issue is made in the municipal court, by the statement of claim, that the evidence must be limited by that statement, and that the issue cannot be enlarged by affidavits or oral claims. Except as provided in section 48, which has no application to cases of the fourth class of this kind, a statement of claim is necessary to the commencement of a case of the fourth class in the municipal court and as the basis of the judgment in such case, and such statement must show a legal liability of the defendant to the plaintiff."

nd the court goes on further to say:

"The statement of claim was not waived by the failure of the defendant to move for a more specific statement. The statement stands for a declaration in common law actions. It is essential to sustain the judgment. The rule is well settled that if a declaration is so defective that it will not sustain a judgment the insufficiency may be availed of on a writ of error even after a demurrer overruled and a plea to the merits."

Under this decision, the cause of action in the case at bar is determined, not by the verdict and judgment, but by plaintiff's statement of claim. In order to prevent the petitioner from being discharged on his petition, the plaintiff's statement of claim must show that malice was the gist of the action. It, however, clearly appears from an inspection of the record alone in the action in which judgment was rendered and on which the ca. sa. was issued, that malice was not the gist of the cause of action as set forth in plaintiff's statement of claim. Therefore defendant was entitled to his discharge on his petition on compliance with the provisions of the Insolvent Debtors Act.

For the reasons hereinabove assigned, the judgment of the County Court will be reversed for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

329 - 20459.

WARREN SALES COMPANY, for the use of WARREN BOAT COMPANY, a Corporation, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
J. L. SHAW, Appellant.	)	OF CHICAGO.

195 I.A. 211

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The appellee, Warren Sales Company, for the use of Warren Boat Company, a corporation (hereinafter called the plaintiff), sued the appellant, J. L. Shaw (hereinafter called the defendant), in an action of the first class in the Municipal Court of Chicago to recover $1450, balance alleged to be due it under a contract for the manufacture and delivery of a hydroplane; and also for the sum of $240.38, for other goods alleged to have been sold and delivered by the plaintiff to the defendant. The defendant filed an affidavit of merits in which he denied that the plaintiff made and delivered the hydroplane as per contract; denied that there was due the plaintiff from the defendant $1450, or any other sum of money, and alleged that the plaintiff was indebted to the defendant for failure to deliver the hydroplane on May 1, 1913, as provided in the contract, and that by reason of said failure, the defendant is entitled to recover from the plaintiff the sum of $5 per day "as provided in the contract." The defendant also filed a "statement and affidavit of claim on set off," the items of which aggregate $1772.81. To this the plaintiff filed an affidavit of merits. The case was tried by the court without a jury, and the issues were found against the defendant and the plaintiff's damages were assessed at the sum of $1[illegible].71. A motion for a new trial was overruled, judgment was entered on the finding, and this appeal followed.

No complaint is made by the defendant as to any ruling of the court on any question of pleadings, or upon the admission or exclusion of evidence, or upon any matter arising during the course

of the trial, and no written propositions of law to be held as law were submitted to the court by either the plaintiff or the defendant, and there is, therefore, no question of law presented by the record for our consideration. Light v. City of Chicago, 334 Ill. 83.

On this record there is but one question presented by the appeal: Is the finding of the trial court manifestly against the weight of the evidence? We have carefully read and considered the evidence in this case, and we are satisfied that we must answer this question in the negative. The judgment of the Municipal Court of Chicago will therefore be affirmed.

AFFIRMED.

No. - 20633.

S. ADRIAN SCHELTES,
Appellee,

vs.

THOMAS M. HUNTER,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

195 I.A. 213

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The appellee, S. Adrian Scheltes, trustee (hereinafter called the plaintiff), instituted a replevin action in the Circuit Court of Cook County against the appellant, Thomas M. Hunter, bailiff of the Municipal Court (hereinafter called the defendant). The case was, by agreement, submitted to the court without a jury; the court found the defendant guilty, and that the right to the possession of the property was in the plaintiff, and assessed the plaintiff's damages at the sum of one cent. A motion for a new trial was overruled, judgment was entered on the finding and this appeal followed.

On December 30, 1911, Nate Schatz, who was engaged in the clothing business in the city of Chicago, under the name and style of "Sart Clothing Company," executed and delivered to S. A. Scheltes, as trustee, a certain deed of trust. This deed purported to be an assignment for the benefit of the creditors of the said Schatz, and by it the latter conveyed to the trustee all his merchandise, furniture and fixtures, cash, bills and accounts receivable, and other property owned by him in connection with the said business. At the time of the execution of the deed, Schatz was owing a large amount of money, practically all of which was due to eleven creditors - one of whom was Rose, Rogers and Rose, a corporation, that held a claim amounting to $2449.05 - and the deed was executed in pursuance of an arrangement made at a meeting of certain of the creditors of Schatz, and it is clear that it was ratified and assented to by ten of the

said eleven creditors. On the trial below there was a conflict in the evidence as to whether Rose, Rogers and Rose ratified and assented to the assignment. Immediately after the execution of the said deed, the trustee took possession of the property conveyed and he appears to have conducted the business from that time until the date of the trial. On May 4, 1912, Rose, Rogers and Rose recovered a judgment against the said Schatz, in the Municipal Court of Chicago, in the sum of $2371. Execution was issued on this judgment and placed in the hands of Thomas F. Hunter, the bailiff of said court, who, on or about June 4, 1912, seized 400 suits of men's clothing in the hands of the said trustee. Thereupon the said trustee, the plaintiff, commenced the present action in replevin.

The declaration consists of the usual counts in replevin. The defendant filed two pleas: the first averred that the property replevined was the property of Nathan Schatz and not of the plaintiff; the second averred justification of the seizure as bailiff of the said court under a writ of execution in full force and effect, issued by the said court on the said judgment in favor of Rose, Rogers and Rose. To these pleas the plaintiff filed a replication.

The defendant contends "that the alleged assignment for the benefit of creditors is void because it tends to hinder, delay and defraud creditors. Being void, no title to any property of Schatz passed to Scheltes, the plaintiff in this replevin action;" that the goods seized by the defendant as bailiff of the Municipal Court were in fact the goods of Schatz, and that the trial court erred in rendering judgment in favor of the plaintiff. The defendant further contends that "the plaintiff did not establish an estoppel by a preponderance of the evidence."

The plaintiff contends: "1. The deed of trust was not made to hinder, delay and defraud creditors, and was not fraudulent or void; 2. A preponderance of the evidence clearly established that the deed of trust was made with the full knowledge and acquiescence

of Rose, Rogers and Rose, and, therefore, was and is binding upon them; 3. The goods seized by the bailiff under the execution were goods purchased by S. Adrian Scheltes, as trustee, and were not subject to seizure under execution against Nate Schatz, the original assignor, even though the original conveyance to the trustee were fraudulent and void."

The trial court found from the evidence that the deed of trust was made with the full knowledge and acquiescence of Rose, Rogers and Rose, and after a careful examination of the proof we are satisfied that we cannot say that this finding is manifestly against the weight of the evidence.

The defendant contends, however, that even if it be conceded that Rose, Rogers and Rose, with full knowledge of the assignment, acquiesced therein, nevertheless, the conveyance is absolutely void because "it permitted the trustee to carry on the business: it authorized him to purchase new merchandise and render the trust estate liable for any loss or profit that would be made out of the new merchandise; it authorized him to pay all expenses incurred by him in the conduct of the business irrespective of whether the expenses were necessary or not: it absolutely required the trustee to employ Schatz and pay him $30 per week: it required the trustee to pay premiums on the life insurance taken out on the life of Schatz: it authorized the trustee to make sales of goods on credit: it limited the liability of the trustee."

It is the settled law of this state that a conveyance made to defraud creditors is valid inter partes. Lyons v. Cushing, 44 Ill. 276; Rappleye v. International Bank, 93 Ill. 395: Union National Bank v. Lane, 177 Ill. 171. Ever as to creditors who are not parties to the assignment and who do not assent to the making of the same, a fraudulent assignment is not void but only voidable. By the finding of the trial court, Rose, Rogers and Rose had full knowledge of the making of the assignment and acquiesced therein, and

the assignment is neither void nor voidable as to it. It is bound by the assignment and cannot attack it as a fraudulent conveyance. Amer. & Eng. Ency. of Law, 2nd Ed., Vol. 6, P. 1[illegible]: Imperial Woolen Co. v. Longbottom, 145 Fed. 485. Many other cases to the same effect might be cited.

In support of the contention that a fraudulent assignment is void, several cases are cited by the defendant. In these cases, it is said that a fraudulent assignment is void, or void per se, or absolutely void, or void as to creditors. The words "void" and "voidable" are often loosely used in text books, decisions of the courts, and statutes. The term "void" is not always used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from "voidable." Amer. & Eng. Ency. of Law, 2nd Ed., Vol. 29, P. 1[illegible]. In many cases in the books it is clearly apparent that the word "void" is used by the court when "voidable" is meant. The cases to which the defendant refers us are of this kind.

Therefore, even if it be conceded that the assignment was made for the purpose of defrauding creditors, a question that we are not called upon to determine in the decision of this case, the contention of the defendant that the conveyance is void and not binding upon Rose, Rogers and Rose cannot be sustained. The trial court, under the facts as found, and under the law applicable to the same, was justified in finding the issues for the plaintiff.

In the view that we have taken of this case, it will not be necessary for us to pass upon certain contentions of the plaintiff.

After a careful consideration of all the questions presented by this appeal, we are satisfied that the judgment of the Circuit Court of Cook County must be affirmed.

289 - 10293.

JAMES T. TRAINER and WILLIAM C. TRAINER, Co-partners, Appellants, vs. ALFRED L. [illegible], Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE FINCH delivered the opinion of the court.

Appellants sued appellee in the superior court for [illegible], which amount appellants claim is due them for services as real estate brokers, in procuring for appellee a purchaser for certain real estate in Chicago, in which appellee was interested. There were two trials in the superior court. In the first trial, a verdict was returned in favor of appellants for $17,500. In the second, a verdict was returned in favor of the defendant (appellee), and from a judgment entered upon the second verdict, the plaintiffs have prosecuted this appeal.

The evidence as to the nature and character of appellants' contract of employment is conflicting. The record shows that there was a sharp conflict in the evidence on other matters pertinent to the issues. As we have reached the conclusion that the judgment of the superior court must be reversed and the cause remanded for a new trial, on account of the errors hereinafter stated, we refrain from expressing any opinion as to the weight of the evidence. For the purposes of this opinion, it is enough to say that, in our opinion, there is sufficient evidence in the record from which a jury, "without acting unreasonably in the eye of the law," could have returned a verdict in favor of appellants; and on the other hand, if the jury placed more credence in the evidence of appellee's witnesses than in that of appellants', the second verdict was fully justified. The fact that it would not be difficult to find from the evidence substantial reasons in favor of a verdict either way, made it important that the instructions given to the jury should be accurate

and free from any misleading tendency. After a careful examination of the instructions and of the evidence, we are constrained to hold that prejudicial error was committed in giving several of the instructions offered on behalf of appellee.

There was evidence tending to prove that in 1907, one of appellants had an interview with appellee, in which appellants were authorized to offer the property in question for sale to any person whom they might think would buy the property, for the price of $1,000,000, and that a commission of two and one-half per cent. upon that price would be paid them, if they "found a purchaser for the property." There was also evidence tending to prove that appellants submitted the property to several prospective purchasers, one of whom was Leon Mandel: that appellant James A. Trainer talked the matter over with Mr. Mandel, and learned from him that he would be willing to pay $1,000,000 for the whole property, including an outstanding lease-hold estate for which the tenant was demanding [illegible]; that thereupon Trainer asked appellee if he would be willing to sell the property for $850,000, subject to the lease, to which appellee replied in the negative: that this reply was reported to Mr. Mandel, who then suggested that he would be willing to buy if appellee would take back a mortgage on the property at a low rate of interest for part of the purchase price, in view of the low rental appellee was receiving from the tenant, but appellee refused to accede to this suggestion, saying that he "wanted to sell it for cash," and that appellants "might be able to borrow the money from somebody at a low rate of interest;" that Mandel then said that as the holiday season was approaching, he was "pretty busy" and would do nothing further until after the first of the year, when he "would take it up" again: that Trainer saw Mandel again in January, 1908, but the latter would not make any better offer than he had made: that Mandel then went to California and was gone until May, 1908, leaving word with Trainer

to let him (Mandel) know at Santa Barbara, California, if, in the meantime, appellee would consent to accept his offer of $1,000,000 for the whole property: that during Mandel's absence, Trainer succeeded in getting the tenant to reduce his price to $150,000 for the leasehold interest: that upon Mandel's return to Chicago in May, the matter was again discussed with him and a plan suggested for a long term lease, but without any result: that in September or October, 1908, Trainer again called on Mandel, but Mandel then said that on account of the death of his brother "he did not know whether he would be in a position to buy anything for some time," and that consequently he was "not interested at the present time:" that in the meantime, however, Mandel had also been negotiating with a broker named Strauss, who had agreed with Mandel to divide his commissions with Mandel's son-in-law, who was also in the real estate business: that in October or November, 1908, Mandel telephoned to another broker named Bacheldor, who had also talked with him about the property, and authorized Bacheldor to negotiate with appellee for the purchase of the property, agreeing to pay Bacheldor a commission of $10,000, on condition that half of it should be paid to Mr. Mandel's son-in-law: that as the result of Bacheldor's negotiations, a written contract of sale was entered into between appellee and Mandel, in January, 1909, by the terms of which Mandel agreed to pay $900,000 for the property, subject to the existing lease, and to pay a commission to Bacheldor, and also agreed to save appellee harmless "from any and all claims for commissions arising out of the sale of said premises," and to defend any suit that might be brought to recover any such commissions.

Throughout the trial, appellants' counsel apparently sought to create the impression that appellee had no real interest in the controversy, but that Mandel was the real party in interest. The court, at the request of appellee, instructed the jury "that this is a suit between James C. Trainer and William O. Trainer on the

one side and Alfred L. Baker on the other and between no one else, and that this is not a suit against Leon Mandel." The instruction then proceeds: "The question simply is whether defendant Baker is liable under the evidence and the instructions of the court to the plaintiffs in this case. You should not, therefore, overlook this fact nor find a verdict against defendant Baker simply because Leon Mandel agreed with defendant and his co-trustees to indemnify and hold them harmless from any and all claims for commission arising out of the sale of the property in question in this case to said Leon Mandel: nor simply because of the fact that defendant and said trustee paid no commission for the sale of said property: nor simply because of the fact, if you find it to be a fact from the evidence, that Mandel paid, or agreed to pay, $10,000 as commission, one-half to E. A. Bacheldor and one-half to Joseph Hineman."

The first part of this instruction is not objectionable, but the last part, which tells the jury they must not "overlook this fact," nor find a verdict against appellee "simply because of" any of the enumerated facts therein stated, should not have been given to the jury. The instruction singled out particular facts, gave them undue prominence, and had a tendency to confuse and mislead the jury. The vice of such instructions is pointed out in Boston v. Teufel, 213 Ill. 291, 300; Wickes v. Walden, [illegible] Ill. [illegible], [illegible]; and Eckels v. Huttschall, 230 Ill. 4[illegible], 4[illegible].

The fifth and eighth instructions given on behalf of defendant are open to the same objection, and to others as well. By those instructions, the jury were first told generally that before they could find for the plaintiffs, they "must find and believe" from the evidence "that Leon Mandel was induced to buy the property in question in this case by and through the efforts of plaintiffs, and that plaintiffs were the efficient and procuring cause of said sale being made to said Mandel, and that their work, in fact, caused

the said Leon Mandel to purchase said property, and that without their efforts and work, he would not have purchased the same." Following this general statement, the instructions go on to say that it is not sufficient for the plaintiffs to show that they called Mandel's attention to the property, gave him the price and description, and tried to sell it to him before he bought it, but that the plaintiffs "must go further and prove by a preponderance or greater weight of the evidence, that they were the direct and procuring cause of the purchase of said property by said Leon Mandel." The language quoted plainly assumes that the facts enumerated did not prove, as a matter of fact, that the plaintiffs were the procuring cause of the sale. Here again, the vice of singling out isolated facts and telling the jury that such facts are not enough to prove the issue, appears. These instructions invaded the province of the jury, were argumentative and misleading, and were clearly erroneous.

By the fourth instruction given on behalf of appellee, the jury were told that if they find from the evidence "that defendant agreed to pay to plaintiffs a real estate commission of two and one-half per cent., in case they found a purchaser, and completed and consummated a sale of the property in question in this case to such purchasers: and you further find from the evidence that plaintiffs did not consummate and complete the sale of the property in question in this case to the purchaser thereof, Leon Mandel, then and in the event you find the foregoing from the evidence, plaintiffs cannot recover in this case, even though you may find from the evidence that they endeavored to sell said property to said Mandel, and communicated to defendant the fact that they were endeavoring so to do."

There was some evidence tending to prove that after the plaintiffs had begun negotiations with Mandel, and had succeeded in inducing him to consider the property favorably, the sale was consummated and completed by him through another broker for the purpose of obtaining a personal advantage, or a lower price, by making it appear that

appellants were not entitled to a commission, and that appellee knew that such was the fact. The instruction omits all reference to this theory of the facts, which, if true, would entitle appellants to recover, even if they did not "complete and consummate" the sale. For this reason, the instruction was erroneous under the facts of this case.

The fourteenth instruction, in its first three paragraphs, purports to set forth all the facts constituting the basis of the plaintiff's claim, and then adds, in a fourth paragraph, the following: "The jury are instructed that even though you may find the foregoing facts from the evidence, nevertheless, plaintiffs cannot recover in this case unless you believe from the preponderance or greater weight of the evidence, the burden of proof being upon plaintiffs, that they were the direct and procuring cause of the purchase of said property by said Leon Mandel." Here again, is the repeated inference, amounting, in fact, to an assertion, that the enumerated facts are not in themselves sufficient to prove that the plaintiffs were, in fact, the procuring cause of the sale that was made. Whether such facts do, or do not, prove that the plaintiffs were the procuring cause of the sale that was made, was the principal question at issue in the case, and the court should not have undertaken to tell the jury that they did or did not prove either side of that issue. After hearing this instruction read to them, the jury may well have concluded that nothing remained for them to do but to return a verdict for the defendant, as the court had by this instruction, decided the facts in advance.

Appellants' counsel also urge, and we think with much justification, that certain statements made by appellee's counsel in his argument to the jury, were of such a character as to arouse the passions and prejudice of the jury. The attack upon appellants' counsel was wholly uncalled for and should have been promptly rebuked by the court. It is true that the court finally sustained an objec-

tion to this part of the argument, but the effect was not thereby removed. Appellee's counsel also went to the extraordinary length of staking his reputation as a member of the bar upon the truth of a statement entirely outside the evidence, that it was customary to make such agreements as were made between Mandel and appellee in this case. It is highly improper for counsel, in the argument to the jury, to state facts that are not in evidence, and it is especially so to fortify such statements in the manner that was done in this case.

For the reasons indicated, the judgment of the Superior court will be reversed and the cause remanded.

REVERSED AND REMANDED.

867 - 20975.

JOHN F. DEVINE, Administrator of the Estate of PHILLIP FITZPATRICK, Deceased,
Appellee,

vs.

ELI PEARLZEIG,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

105 I.A. 221

MR. JUSTICE FITCH delivered the opinion of the court.

This is an appeal from a judgment rendered against appellant in an action brought to recover damages for negligently causing the death of Phillip Fitzpatrick, deceased. About dusk in the afternoon of August 7, 1905, appellant left his horse and buggy standing at the curb on Calumet avenue, near 47th street, in the city of Chicago. The horse ran away, going east on 47th street to St. Lawrence avenue, and then north. Fitzpatrick was standing in front of an apartment building on the west side of St. Lawrence avenue near 48th street, and attempted to stop the runaway, but was thrown to the ground, and injured so seriously that he died the next morning. The evidence on behalf of appellant tends to prove that when appellant left the horse and buggy on Calumet avenue, he attached a heavy strap and twenty-five pound weight to the horse's bit, that some children were playing "horse" on the sidewalk and gave a signal to start, that the horse started off, dragging the weight, then began to run and broke the strap, and that a piece of the strap was dangling from the bit when the horse was finally stopped. On the other hand, two of appellee's witnesses, who saw the accident from a front window of an apartment building on St. Lawrence avenue, testified that at the time of the accident there was no strap hanging from the horse's head except the reins which were wrapped around the whip in the buggy. An ordinance of the city of Chicago was introduced in evidence, which prescribes a penalty for leaving in any public street of the city, a horse to which any vehicle is attached,

"without securely fastening such horse." There was also evidence that St. Lawrence avenue is in "a populous section" of the city, with residence buildings on both sides of the street.

It is apparently conceded by appellant's counsel that proof that appellant's horse was running away unattended in a public street of the city, together with the introduction of the ordinance in evidence, constituted a prima facie case of negligence on the part of appellant. It is insisted, however, that there is no evidence in the record fairly tending to prove that the deceased was in the exercise of ordinary care for his own safety at and just before the time of the accident, and that, for this reason, the court erred in refusing to instruct the jury to find a verdict for the defendant.

It appears from the evidence that just before the accident, Fitzpatrick, who was the janitor of the apartment building above mentioned on St. Lawrence avenue, had been showing one of the apartments to a man and his wife, and the three were standing on the sidewalk when the runaway approached: that no other persons were in sight upon the street in the direction in which the horse was going: that Fitzpatrick and the other man ran into the street to stop the horse; that they stood about eight feet apart, one on each side of the apparent path of the runaway, Fitzpatrick two or three feet behind the other man; that as the horse approached, the first man waved his arms, and the horse swerved and ran into Fitzpatrick and knocked him down. Appellee's counsel contends that the question of contributory negligence was properly left to the determination of the jury, because, it is said, it is a fair inference from this evidence that Fitzpatrick was apprehensive of danger to someone, and therefore cannot be charged with negligence in attempting to avert such danger - and thereby, perhaps, to save a human life or lives - by stopping the runaway horse. The difficulty with this contention is that there is no fact or circumstance in the evidence which fairly tends to prove

either that any other person was likely to be injured by the runaway horse, or that the deceased had any reasonable ground to apprehend - if in fact he did apprehend - that any one would or might be injured by the runaway horse, if not stopped. The rule that a person has a right to risk his own life in an effort to save the life of another person, without being chargeable with contributary negligence, is well established by the authorities, and was recognized in this State in the case of West Chicago St. Ry. Co. v. Liderman, 187 Ill. 463. But this rule is limited to cases where the attending circumstances and conditions are such as to afford a reasonable basis for the belief that it is necessary to take such a risk in order to save another or others, from personal injury or death.

In West Chicago St. Ry. Co. v. Liderman, supra, it was said, quoting from the opinion in Eckert v. Long Island R. R. Co., [illegible] N. Y. 502: "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence which will preclude a recovery for an injury so received: but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless."

In Manthey v. Rauenbuehler, 70 N. Y. Supp. 714, a blacksmith, seeing a runaway horse in the street near his shop, attempted to stop it and was killed. It was contended that the deceased was guilty of contributory negligence as a matter of law in "rushing from a place of safety and upon the street to stop a runaway horse." The court held the contrary, however, under the facts shown by the evidence. It appeared from the evidence that the neighborhood where the accident

occurred was a tenement house district: that many children living in that neighborhood were in the habit of playing upon the street: that across from the blacksmith shop was a kindergarten, and near it was a public school; and that at the time of the accident, the street was more or less filled with children who were crossing back and forth and playing in the street. The court said that upon proof of such circumstances, a fair question was presented for the determination of the jury "as to whether, when the blacksmith left his shop and caught the rein he did such act under an apprehension that if the horse was not stopped, injury would happen to some of the children in the street. * * * In principle, therefore, the case does not differ from those cases where an individual has sought to rescue a child or person from impending danger to life and has received injuries resulting therefrom."

In Hollaran v. City of New York, 15[illegible] N. Y. Supp. 447, a recovery was sustained under similar circumstances. There, two of the defendant's horses, attached to a street sweeper, and unattended by a driver, were running away on a busy street in Brooklyn. The plaintiff's intestate attempted to seize the reins and stop the horses, but was carried under the sweeper and killed. It was contended that the deceased was not "justified by impending danger to persons in the street and by the situation presented in exposing himself to the peril of attempting to stop the horses." As to this contention the court said: "The horses were running in a measurably busy street, and there was ample opportunity for harm to come to someone, although the danger was not at the moment imminent to a definite person. * * * In the case at bar, horses with a street sweeper were dashing ungoverned through the street, and the jury were justified in inferring that, if they continued unchecked, harm would come to some one."

In each of these cases, there was proof of facts or circumstances from which a jury might reasonably infer that the act of the

person attempting to stop the runaway was prompted by a reasonable apprehension of danger to human life, if the runaway were allowed to proceed. There is no such proof in this case. If there was any person in the path of the runaway horse, or about to enter such path, to whom any danger of personal injury could reasonably have been apprehended, or if the deceased had any reason to believe that such was the fact, the evidence does not show it; nor are there any other facts or circumstances from which a jury might reasonably find that the deceased risked his life to save the life of another, or to save others from bodily injury.

It follows that the court erred in refusing to give the instruction requested at the close of the plaintiff's evidence. The judgment of the Superior Court will therefore be reversed and the cause remanded.

[illegible]

637 - 20975.

JOHN F. DEVINE, Administrator of the Estate of PHILIP FITZPATRICK, Deceased,
Appellee.

vs.

WM. PEARLMAN,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

1917 A 421

OPINION BY MR. PRESIDING JUSTICE DONAHUE on the motion of the appellee to amend or modify the judgment order heretofore entered.

Since the filing of the opinion in the above entitled cause, the appellee (plaintiff below) has filed a motion in this court, requesting that the judgment order heretofore entered be amended or modified by striking out the remanding portion of the said judgment order, and in support of the motion, the appellee "admits of record that he would be unable to prove, on any future trial, or trials, of the cause, any other or additional facts, or circumstances, showing or tending to show, that the deceased was in the exercise of ordinary care for his own safety, either before or at the time of his injuries, besides, or in addition to the facts, or circumstances, which were proven at the last trial of the cause." The appellant (defendant below) thereupon filed his consent to the granting of this motion of the appellee. Subsequently the appellant filed a motion asking leave to withdraw the said consent, and requesting that the judgment order be allowed to stand.

In the brief filed by the appellant, the point was made that "the court should have directed a verdict, because the plaintiff was guilty of contributory negligence as a matter

of law," and it was strongly insisted that our judgment should be reversed and the cause not remanded. We reversed the judgment solely because we held that the deceased was guilty of contributory negligence as a matter of law, but we remanded the cause for the reason that we were of the opinion that the appellee, on a new trial, might be able to introduce evidence tending to show that the deceased was in the exercise of ordinary care for his own safety at the time of, and just before, the accident in question. In view of the stipulation filed by the appellee, it would be an entirely useless thing for us to remand the cause. Whether the motion of the appellant to withdraw the consent filed by him be granted or disallowed is immaterial.

The judgment order heretofore entered in this cause will be amended by striking out that part of the order that remands the cause.

JUDGMENT ORDER AMENDED BY STRIKING OUT A [illegible] CLAUSE.

20957

Gal - 20959.

CHARLES HOSCHE, Jr., Appellee,	)	A PEAL FROM
vs.	)	MUNICIPAL COURT
CHICAGO IRON & METAL CO., a Corporation, Appellant.	)	OF CHICAGO.

Gridley, Judge.

1951 I.A. 224

STATEMENT OF THE CASE. Appellee (plaintiff below), upon the trial before the court without a jury, recovered a judgment for $1,138 against Appellant (defendant below), who was charged with the conversion of certain machinery which plaintiff alleged the defendant had received and agreed to hold as bailee without reward. Defendant appeals.

In February, 1911, a fire occurred at the place of business of one A. A. Dawson, a dealer in second-hand machinery. As a result of this fire, the greater part of the machinery there located was so damaged as to render it unfit for further use as such. The contention of the plaintiff is, that such machinery was sold by Dawson to the defendant, a dealer in scrap iron, having two yards, known respectively as Halsted Street and Lake Street yards; that at the time of the fire he had on consignment with the said Dawson a lot of second-hand laundry machinery which had been placed in merchantable condition by Dawson; that because of the fire it became necessary to remove said machinery from Dawson's premises; that defendant, in the course of the negotiations for the purchase from Dawson of what the defendant designated as "machinery cast scrap," agreed to permit the said laundry machinery to be stored in its Lake Street yard without reward; that in accordance with said agreement, said laundry machinery was therefore taken to the said yard of the defendant; that thereafter defendant refused to return said property on demand and converted same to its own use.

Defendant contends that plaintiff has not shown that this property ever came into its possession; further, that as to said property, even though it came into its possession, it was a bailee without reward, and the plaintiff failed to show by a preponderance of the evidence that

the property was lost through the gross negligence of the defendant: and, finally, that the property in question was part and parcel of the property purchased from the said Dawson, and for which it had paid: for all of which reasons it disclaimed any liability.

On behalf of the plaintiff, the testimony shows that shortly after the aforesaid fire, Dawson called at defendant's place of business for the purpose of selling the machinery which had been rendered unfit for further use as such, and that he talked with one Santowsky, president of the defendant, who afterwards called at Dawson's premises: that Dawson showed him what he had for sale: that they discussed and arrived at terms of sale: that the sale was confirmed by letter from defendant to Dawson, a carbon copy of which was introduced in evidence and reads as follows:

"Phones. Monroe 1[illegible]
Harrow [illegible].
Orders by mail or phone promptly attended to.

Chicago Iron & Metal Co.
Incorporated.
Wholesale Dealers in
Scrap Iron and Metals
Second-hand Machinery
[illegible] S. Halsted St.
Yards: 817-819 W. Lake St.
732-734 W. Lake St.
Office: [illegible] S. Halsted St.

Chicago, Mar. [illegible], 1911.

Mr. W. L. Dawson,
Chicago.

Dear Sir:-
We hereby confirm purchase of all machinery cast scrap contained in building located number [illegible] N. Desplaines St. at $11.[illegible] per net ton. We enclose our check for $[illegible]0.00 to apply on account.
Very truly yours."

that while the property sold was being taken away from Dawson's place of business, the said Dawson stated to Santowsky that there was certain laundry machinery there which would have to be removed: that he would like to find some place to leave it until he could make arrangements to dispose of it: that thereupon Santowsky stated that he might store same in defendant's yard, without any charge: that thereupon defendant hauled this laundry machinery to its Lake

street yard, for which hauling a charge was made and paid by said Dawson: that in endeavoring to dispose of the property, he (Dawson) had occasion to call at defendant's yard five or six weeks afterwards, and saw the laundry machinery there: that thereafter he occasionally saw the property in the defendant's yard: that on a later occasion, within a year from the time it was moved there, he again visited the yard of the defendant but could not find the property: that thereafter he endeavored to see Santowsky but was unable to do so, but succeeded in seeing the bookkeeper, who stated he knew nothing about it: that thereupon letters were written on behalf of the plaintiff, asking information with reference to the property and requesting its return: that no answer was made or any explanation given as to its whereabouts or disposition: that the reasonable fair cash market value of said property was about $1,175.

On behalf of the defendant, Santowsky denied having had any conversation with Dawson relative to the storage by defendant of the machinery in question. There was further testimony that all the machinery that was delivered either at its Lake street or at its Halsted street yard, was part of the property purchased under the letter dated March 11th, heretofore set out, and had been paid for: that said laundry machinery, even though it was intact and usable, was considered as machinery cast scrap; furthermore, that no money was paid defendant for hauling the laundry machinery to its Lake street yard. While Santowsky denied having had a conversation with Dawson relative to the storage of this laundry machinery, he does, however, admit that in a conversation with the said Dawson at the time of the negotiations that led up to the agreement embodied in the letter aforesaid, he (Dawson), stated: "All the machines that is there that have any good, we will take away, the rest we can pick out." There was no evidence on the part of the defendant as to the value of the property in question.

We are satisfied from the evidence that the machinery in question was received by the defendant. There is, however, a sharp

conflict in the evidence as to whether this machinery was to be considered machinery cast scrap and part of the property purchased from Dawson, or whether said laundry machinery came into defendant's possession as bailee without reward, as claimed by the plaintiff. These were purely questions of fact, which (in the case at bar), were determined by the court in favor of the plaintiff's contention. It is the uniform holding of our courts that the finding of the trial court on questions of fact, where the case is tried by the court without a jury, is binding on this court unless such finding is clearly and manifestly against the weight of the evidence. This we are unable to say.

Although defendant at first contended that there could be no recovery, even though there was a bailment without reward because plaintiff had failed to introduce evidence that the property was lost because of gross negligence on the part of the defendant, yet this contention is abandoned by defendant, as will be seen from the following statement in its reply brief:

> "The issues in this case resolve themselves into two main questions: 1. Did the purchase and sale of the machinery scrap include the property in question? 2. Was there a bailment of the property in question?"

It is fair to presume that counsel realized that the contention abandoned was inconsistent with the real defense to plaintiff's action, viz., that the property in question came in to its possession under the contract of purchase with Dawson and not by reason of any agreement for deposit without reward. These were the questions which, by the finding of the court and judgment rendered thereon, were determined favorable to the plaintiff, which finding we have already held we cannot disturb.

Finding no reversible error, the judgment will be affirmed.

641 - 20979.

CHALMERS MOTOR COMPANY OF ILLINOIS, a Corporation, Appellee,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
EDGAR F. DANEY, Appellant.	)	OF CHICAGO.

STATEMENT OF THE CASE. This is a suit commenced in the Municipal court of Chicago by the Chalmers Motor Company of Illinois, a corporation, appellee, hereinafter referred to as the plaintiff, against Edgar F. Daney, appellant, and hereinafter designated as the defendant, to recover the balance due on a promissory note for $1,375, dated May 17, 1913, signed by defendant and payable to the plaintiff, due six months after date. To the amended statement of claim an affidavit of merits was filed on May 26, 1914: this was stricken from the files and leave granted the defendant to file an amended affidavit of merits, which was done June 4th. On June 10th the court, on motion of the plaintiff, struck the amended affidavit of merits from the files and defendant was defaulted for want of a sufficient affidavit of merits, whereupon the court assessed plaintiff's damages in the sum of $1,[illegible], for which the court entered judgment: to reverse which defendant has prosecuted this appeal.

MR. JUSTICE PAM delivered the opinion of the court.

Defendant, on this appeal, questions the action of the court, first, in striking his amended affidavit of merits from the files, and, secondly, in denying his motion to have the damages assessed by a jury. We shall take up these points in the order named.

On the first contention, the only question in issue is, whether or not defendant's affidavit of merits stated a good defense to the cause of action set forth in plaintiff's amended statement of claim. Said amended statement of claim set forth that on April [illegible], 1913, plaintiff and defendant entered into a written contract for the

sale and purchase of an automobile and certain accessories, said contract being in the form of a letter and acceptance and was as follows:

"April 23, 1913.

Mr. Edgar F. Doney,
111 W. Monroe St., Chicago, Ill.

Dear Sir:

We propose to deliver to you F.O.B. cars Detroit:

One 1913 Chalmers Six Cylinder, 4 passenger Torpedo type, gray touring car, duplicate of one shown you today, for the net sum of	$400.00
Plus freight to Chicago	20.
Nobby treads on rear at extra cost of	22.50
One extra Nobby treat tire and tub	52.50
One tire cover for tire	3.50
Monogram as selected to be put on gratis.	
Total	[illegible]

We to accept your 1912 "38" car complete with tire, tubes, tools and all accessories, except cloth, in good operative condition, as at present equipped, in part payment at $1,125.50. The balance to be paid in six monthly installments of equal amounts, to be dated from date of delivery of car. Said balance to be evidenced by notes bearing interest at six per cent. Delivery to be made on or about May 1st.

We to have winter top.

Respectfully submitted,
CHALMERS MOTOR CO. OF ILLINOIS,
Charles E. Gregory, Manager.

This proposal accepted this 23rd day of April, 1913.
EDGAR F. DONEY."

that in May, 1913, the automobile described in said written contract was delivered to the defendant, and that during the same month defendant signed a promissory note for the balance due plaintiff in accordance with the terms of the contract: that subsequently, and prior to December 15, 1913, plaintiff performed work for and furnished materials to the defendant for use on said automobile, to the value of $298; that prior to December 15, 1913, defendant complained to plaintiff concerning the condition of said automobile and the charge made by plaintiff for the work done and material furnished as aforesaid: that on December 15, 1913, defendant entered into an agreement in writing, or as plaintiff is pleased to call it a "written account stated," concerning payment of the note and the charges for said work and material. This agreement was as follows:

"Dec. 19, 1913.

Mr. Edgar F. Seney,
111 W. Monroe St., Chicago, Ill.

Dear Sir:-

Responding to your proposal of even date, offering a plan of settlement of your open account and promissory note, it will be agreeable to us to extend payment of your note and account as follows:

You are to pay us $650.00 this month to be applied in settlement of your open account in amount $[illegible]6.00, less credit notation made by the writer on statement which you have in your possession, the balance of said $[illegible] to be endorsed on promissory note, in amount $1,375.00, dated May 17, 1913. You are also to pay $500.00 on promissory note in January, 1914, and the balance due on said promissory note is to be paid in February, 1914.

Respectfully submitted,
CHALMERS MOTOR CO. OF ILL.,
CHAS. F. TREMONT,
General Manager.

This proposal accepted this _____ day of December, 1913.

EDGAR F. SENEY."

that the credit notation referred to in said agreement was a credit of $24.11, leaving a balance due on the open account referred to in the terms of the agreement of $271.89; that on January 17, 1914, defendant paid plaintiff on said open account $271.89, and $[illegible].11 on the amount due on said note; that no other payments were made by defendant, and that there was then due plaintiff the sum of $1,[illegible] on said note.

The amended affidavit of merits filed by defendant did not deny the making of either the original contract under date of April 23rd or the agreement of December 19th, but alleged that plaintiff, under the original agreement, warranted the car to be first-class in every respect, but that said car did not come up to said alleged warranty but was of inferior grade and did not run as warranted by plaintiff; that thereupon defendant returned the automobile to plaintiff, who agreed to repair same and put it in first-class condition; that on or about the 19th of December, when plaintiff presented its bill for repairs to said machine, defendant objected, and thereupon it was agreed by and between the parties that if de-

fendant would pay $500, $271.[illegible] to be applied for labor and material, and $[illegible].11 on account of note sued on, plaintiff would guarantee and warrant that defendant would have no further trouble with said car and that same would be in good and perfect condition; that thereupon defendant entered into the agreement of December 15th; that plaintiff, however, did not fulfill said warranty, and that therefore said automobile was of far inferior grade, and that defendant thereby was entitled to a recoupment from plaintiff for the amount still due on said note.

In our view of the case it is unnecessary to consider the agreement of April 23rd, but only that of December 15th. It is admitted by defendant in his affidavit of merits, that the letter of December 15th and the acceptance noted thereon, set forth in plaintiff's statement of claim as a "written account stated," was the only written evidence of an agreement between the parties. While defendant claims that in connection with this agreement plaintiff warranted that the said car would be free from all defects and in good order, a reference to said agreement shows no such warranty to have been embodied therein. If there was any such warranty made, it must necessarily have been in parol. We are unable to find any case wherein it is held that a parol warranty may be set up as part of the consideration for a written contract of sale unless same is incorporated therein. A case particularly in point is Lumsden v. Caldwell, 43 Ill. App. 175, and the court there held that a warranty, in order to constitute part of a written contract of sale, must be embodied therein. In Telluride Power Company v. Crane Co., [illegible] Ill. 218 - a case similar in principle to the case at bar - an agreement had been made first, between the Crane Company and one Rhodes, to furnish certain pipe. Rhodes could not complete the contract. Afterwards the Telluride Power Company, who was also interested in the work to be done by Rhodes, entered into an agreement in the form of a letter, containing a written offer of terms, which

was accepted by a telegram and a letter, whereby the Telluride Power Company agreed to take the pipe and pay for same. Upon its failure to pay for same, after having used the pipe, the Crane Company instituted suit, and one of the defenses to the suit was that the plaintiff had warranted the strength, quality and thickness of the pipe, and the court held (p. [illegible]):

> "The questions as to what writings should be considered, and whether or not those considered constituted a written contract, and whether or not the written contract fully expressed the agreement between the parties, were for the court. The rule is, that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings. The fact that a point has been omitted which might have been embodied therein will not open the door to the admission of parol evidence in that regard." (citing Seitz v. Brewers' Refrigerating Co., 141 U. S. 510.) * * *
>
> "The rule is too well recognized to require citation of authorities, that all preliminary negotiations, whether oral or written, are merged in the written contract. The offer by appellants to buy the pipe, which appears in Nunn's letter of February 5, and the stipulation of terms therein upon which the purchase would be made, considered together with appellee's letter and telegram of the eighth accepting appellants' offer, constitute a contract in writing which is clear and unambiguous, both as to its object and extent. Considering those documents alone, without any reference to previous negotiations, they leave nothing to be explained, - they contain all the elements of a complete written contract. If appellants had desired any further conditions, it was their duty to have so stipulated. The fact that in their written proposal to purchase they require no warranty of the pipe, precluded them from insisting upon it on the trial."

So in the case at bar, whether or not the letter of December 18th and the acceptance thereon constituted a written contract, and, if so, whether it fully expressed the agreement between the parties, was a question for the court, to determine in passing upon the motion to strike. Following the rule as laid down in Telluride Power Company v. Crane, supra, an inspection of the letter of December 18th and the acceptance noted thereon, shows a complete legal obligation, "without any uncertainty or ambiguity as to the obligation or extent of the engagement:" and therefore, it must be regarded that the whole agreement of the parties was expressed therein. The only issue presented by the amended affidavit of merits was,

whether or not plaintiff had entered into a warranty. The fact that in the letter and the acceptance noted thereon there was no mention made of any warranty precluded defendant from claiming the benefit thereof. We are therefore of the opinion that the amended affidavit of merits was properly stricken from the files.

Defendant also complains that the trial court erred in overruling defendant's motion to have the damages assessed by the jury. The record shows that this motion was not made until after the court had assessed plaintiff's damages and entered judgment. The motion came too late. In Mann v. Brown, 253 Ill. 394, this point was passed upon and the court said (p. 397):

> "The demand for a jury was made before there was any default and when it was apparent plaintiffs in error did not contemplate a judgment against them by default. The demand was for "trial by jury," and we think it clearly had reference to a trial of the issues when made up and not to an assessment of damages. If plaintiff in error had wanted the damages assessed by a jury they should have made that request after default was entered, and not have stood by and without objection have allowed the court to assess the damages."

To the same effect is Bell v. Federal Life Ins. Co., 236 Ill. 425.

As to both errors assigned, it is obvious that the contention of the defendant is without merit, and appellee is justified in its contention that this appeal is prosecuted merely for delay. Judgment will therefore be affirmed with statutory ten per centum damages.

545 - 21943

CARL CHRISTENSEN, Appellee,	)	
	)	APPEAL FROM CIRCUIT COURT,
vs.	)	COOK COUNTY.
R. W. DANIELMANN COMPANY, Appellant.	)	

THE COURT.

This is a motion to dismiss an appeal from the judgment of the Circuit Court in a proceeding under the act entitled "Compensation for accidental injuries or death," approved June 10, 1911, in force May 1, 1912, on the ground that this court is without jurisdiction.

We are of the opinion that the motion must be allowed. In Levin, Admr., v. Wells Bros. Co., No. 2 7[illegible], Branch C. of this court has recently so ruled upon a similar motion, and the reasons therefor as given in the opinion filed in that case seem to us to be sound. The motion to dismiss for want of jurisdiction is allowed.

24 - 20062

[illegible] MILLER,
Defendant in Error,

vs.

[illegible] and [illegible]
[illegible], co-partners as Albert
Miller & Co.,
Plaintiffs in Error.

[illegible]

[illegible]

1951 A. 233

[illegible]

DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for three cars of hay sold and delivered to defendants, which was the last shipment of a sale of a number of cars, the previous shipments having been paid for. The defense was (1) that the quality was not as represented, and (2) unreasonable delay in making shipment. Defendants claimed as a set-off damages by reason of delay in shipments. Upon trial the jury, under instructions from the court, returned a verdict against defendants' set-off and for the plaintiff in the amount of $269.77.

On behalf of the plaintiff it was shown that a representative of the defendants, who were engaged in business at Chicago, examined the hay which plaintiff was for sale upon his ranch near Potomac, Montana, that he went into the mow and up on top of the hay and examined it all, spent "a couple of hours" doing this, and then told plaintiff he would purchase it. There was no evidence to the contrary, and as relates to quality there could have been no defense based upon failure of quality. As to delay in shipments, plaintiff showed that [illegible] was under no obligation beyond loading the hay at Potomac, Montana; hence he could not be responsible for any delay in [illegible] the hay from that point to Chicago.

Defendants say that the court did not allow them to introduce evidence in defense and that the peremptory instruction to the jury was erroneous. We do not find from the record that defendants placed any witnesses on the stand or asked any questions of them. The most they did, through their counsel, was to engage in a discussion with the court. It has been held that such procedure does not amount to an offer of evidence and that the remarks of the court do not amount to a refusal to admit evidence. Chicago City Ry. Co. v. Carroll, 206 Ill. 318.

As to the difference claimed in weights of the bales of hay in the three cars sued for, the court accepted the weights claimed by defendants in their affidavit of defense, and instructed the jury to return a verdict upon this basis. Hence defendants were not harmed in this respect.

The judgment is affirmed.

Affirmed.

73 - 20375

John S. McVicker, Administrator of the Estate of Vladislaw Laszkowsky, Deceased, Plaintiff in Error,	
vs.	March 2d Term, A.D. 1909.
CHICAGO & WESTERN INDIANA RAILROAD COMPANY and the BELT RAILWAY COMPANY OF CHICAGO, Defendants in Error.	Cook County.

195 I.A. 234

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Vladislaw Laszkowsky, hereinafter called plaintiff, died from infection of a bullet wound received from a revolver fired while in the hands of a special policeman, Sirsing, employed by defendants about their tracks in the vicinity of Lexington avenue and 94th street in Chicago. Upon suit in an action of trespass on the case alleging that defendants, by their servants, with force and arms assaulted plaintiff, causing his death, the jury returned a verdict finding the defendants not guilty, on which verdict the court entered judgment. The testimony tended to show that in the evening of February 14, 1908, Sirsing and two other special policemen saw two men stealing coal from cars on defendants' tracks. The officers separated and followed them and Sirsing overtook the two men, who were carrying the stolen coal in sacks. One of the men was plaintiff, who is described as the "big man." While there is some slight conflict in the testimony, Sirsing's story in the main is uncontradicted. He says that he showed his star to these two men and demanded the return of the coal but they dropped their sacks and "tackled" him. He says that he had offered no violence to them up to that time.

Wirsing drew a revolver and fired in the air, as he says, to attract the attention of the other two officers. His story of the affair from that point in substance is as follows:

> "With that the big man broke away from me and ran into what I afterwards found to be his yard. I fought the little man into his yard, where we were met by the big man. The big man had an ax and threw it at me, striking the fence. In the meantime the little man backed away from me and disappeared and my time was taken up with the larger man of the two. He ran into the shed and got a shovel, and I went into the shed after him and tried to get the shovel away from him, at the same time telling him to 'drop that.' I fired another shot into the fence, thinking thereby to make him drop it. About a few minutes after that we kept on struggling and he attacked me with the shovel and he struck me in the right hand. I had the revolver in my hand pointed directly at him when he struck me on the hand. It exploded and the shot struck him on the knee. After that he rallied and drove me into the alley."

On cross-examination the witness said that plaintiff struck him several times with the shovel, and also "he struck the gun. When the gun went off I was not trying to fire the gun at all." Other witnesses gave testimony tending to corroborate Wirsing, and it seems to have been proven beyond serious doubt that the firing of the revolver was simultaneous with the blow on the hand in which it was held from the shovel wielded by plaintiff. From the facts in evidence we would have little trouble in concluding that the actual firing of the shot was not the intentional act of defendants' servant, but was accidental as regards them.

Do defendants' special plea of non assault demesne and plaintiff's replication de injuria absque tali causa eliminate the factor of accident in the shooting? Under the technical rule of pleading we cannot be controlled by the view that the shooting was accidental. While the evidence tends most strongly to prove that the firing of the shot was accidental, yet under the evidence the jury could properly believe that it was fired in self defense. The

jurors were not bound to believe Wirsing's statement that he "was not trying to fire the gun," but might reasonably believe it to be more probable that when plaintiff made the first attack and persisted in these attacks, using an ax and shovel and striking Wirsing several times, the latter, seeing the shovel descending upon him, believed with reason he was in danger of receiving bodily harm and volitionally pulled the trigger.

Complaint is made of the giving and refusing of instructions. Some of the instructions offered by the plaintiff contained a correct statement of the law and might have been given, but we cannot hold that refusing them was reversible error.

Under the proven facts of the case there was no liability of defendants, and the judgment is affirmed.

AFFIRMED.

MR. JUSTICE BAKER DISSENTS.

156 - 20470

LEONARD C. REID, Administrator of the Estate of George Upton, Deceased, Defendant in Error,

vs.

SAMUEL N. LINCOLN, Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

1951 A. 240

MR. PRESIDING JUSTICE McCULLY DELIVERED THE OPINION OF THE COURT.

Plaintiff in his statement of claim charged that defendant had control over a flat building in Chicago; that George T. Upton, father of the deceased, occupied a flat therein; that Harry Phillips was defendant's janitor; that a fire was started near the premises; that the janitor threw rubbish on the fire and that it came in contact with and ignited the clothing of George Upton, then slightly over four years of age, who was passing by, and that he was so severely burned that he died. Defendant denied that the janitor ever started the fire in question or threw rubbish on it, and sought to introduce testimony tending to show that the child had set himself on fire. Upon trial the plaintiff had judgment.

We must reverse this judgment and remand the cause because of errors committed upon the trial.

No eye-witness testified to having seen the child catch fire or that he was dangerously near the spot where the fire is said to have been. The existence of the fire itself is sharply controverted. The fire was said to have been on a vacant lot near the flat building. A heavy gate shut off the passageway from the courtyard of the flat building to this lot. The last seen of the child before the accident was by a young girl who testified that she opened this gate and allowed the child to go through the

gateway and that she then closed the gate, leaving him outside. About an hour afterwards he was discovered by his mother inside the courtyard with his clothes burning. He was dressed at the time in an "Indian" suit with feathers and streamers.

The connection between the alleged burning pile of rubbish and the ignition of the boy's clothing can only be made from inference, and that the evidence before us warrants a reasonable inference of such connection is very doubtful.

It was harmful error to admit testimony that the defendant, Lingle, had been seen before that time burning garbage nearby at various times when children were near. It is not claimed that Lingle made the instant fire or was on the premises or knew anything about it at the time. This testimony would tend to show that defendant was a careless man and indifferent to the safety of children, and hence would prejudice the jury against him. The habits of defendant were not in issue.

It was also error under the circumstances to permit plaintiff to introduce in evidence a section of the ordinance of the City of Chicago making the building of a bonfire in any street or alley an offense for which the offender can be fined. The evidence showed that the burning of the rubbish was on a vacant lot or, as some of the witnesses called it, the prairie. In any event the location of the fire, whether on the lot or in the alley nearby, had nothing to do with the accident. Defendant was not on trial for the violation of an ordinance.

It was also prejudicial error not to allow defendant to introduce testimony that the deceased child at different times before this accident had been found with

matches in his possession which had been taken from him, and that he had several times set fire to his clothing with them. In the absence of any direct evidence as to how the child's clothing caught fire, this evidence offered by defendant would tend to rebut any inference that defendant's negligence caused the accident. Defendant was entitled to have the jury consider any facts which might give rise to an exculpating inference as to the cause of the burning of deceased, equally reasonable to the inference claimed by plaintiff. If the jury should believe that the child's clothing was set on fire from matches in his possession defendant could not be liable for negligence.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

265 - 20591

MRS. M. J. GILLING,
Defendant in Error,

vs.

ALMEN GROSSMAN and MAURICE
L. BRIDGES,
Plaintiffs in Error.

Error to Municipal Court
of Chicago.

195 I.A. 242

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit, filing a statement of claim alleging that a fur coat purchased by her of defendants was not as represented, and claiming damages. Defendants filed an appearance and an affidavit of defense denying that any representations as claimed had been made. The case was duly set for trial, and on that date the plaintiff appeared but the defendants were absent and not represented, and the court entered judgment against them for the amount of plaintiff's claim. Within two days thereafter defendants, by their attorneys, filed a written motion to vacate the judgment, which motion was supported by an affidavit. This in substance alleged that the failure to be present on the day of the trial was due to a mistake of a clerk in the office of defendants' attorneys who was confused by the arrangement of the cases on the Municipal Court judges' calls which appeared in the "Daily Municipal Court Record," which was distributed in a daily paper or bulletin given out at the call calls. It is not necessary to give the details of the mistake which led to the mistake of the clerk. Certainly, of course, a clerk should not have a so [illegible] mistake, [illegible] it appears to have been an excusable mistake, particularly the fact that some of the judges were [illegible] Call

on account of the sessions of the State Bar Association, while others were not.✓

Under the circumstances we think the trial court should have vacated the judgment and permitted the defendants to have their day in court. The judgment is reversed and the cause remanded.

[illegible] and [illegible] JJ.

296 - 20625

BUTCHER [illegible] GRAIN COMPANY,
a corporation,
Defendant in Error,

vs.

J. T. Fish, trading as J. T.
Fish [illegible],
Plaintiff in Error,

[illegible] to Superior Court
of Cobb [illegible].

195 I.A. 243

Mr. Presiding Justice [illegible]

DELIVERED [illegible] OPINION OF THE COURT.

In a suit to recover for crates sold and delivered, plaintiff had judgment for $672.16. The evidence tended to show that in March, 1911, Mr. Butcher, plaintiff's predecessor, made a verbal contract with the defendant, a fruit merchant on South Water street, for about 5,000 crates at 17 cents each, to be shipped to Atherton, Texas, where they were to be used by onion growers in the neighborhood who were shipping onions to defendant. Fish says that his firm was to collect for plaintiff the price of the crates from the growers as they were shipped to defendant, but Butcher denies this, and the evidence supports the claim of plaintiff that the transaction was a sale to the defendant. Plaintiff proceeded to make shipments and has delivered some 15,000 or more crates, but it was advised on account of the market being bad to stop shipments. It thereafter agreed to release the defendant from liability for the balance of crates, about 1,000, contracted for but shipped but not delivered. At Atherton the crates were delivered to an onion platform built along side the railroad tracks for the accommodation and convenience of the growers. On June 24th Butcher called at the office of defendant for the purpose of preparing a settlement for all crates that had been shipped, and it was then ascertained that there was a balance

due plaintiff of $821, not taking into account certain crates which had been delivered to one Abets, an onion grower who was marketing his crop through the defendant. The number of these Abets crates was about 4354. As the result of the conversation at this time a written contract was entered into as follows:

> "In consideration of accepting S. T. Fish & Company's check A5214 for Eight hundred and Twenty-one dollars, it is understood that the balance of the crates, 4354 crates, delivered to Charles Abets at Asherton, Texas, are to be returned to the onion platform at Asherton; and if any shortage, when delivery is made to the platform, from above number, S. T. Fish & Company agree to make good.
> (Signed) S. T. FISH & COMPANY.
> Accepted: BUCHER [illegible] CRATE COMPANY."

Although there is some variant testimony on the subject, the jury could reasonably believe that on or after the date of this agreement no crates were delivered to the onion platform at Asherton by Abets or anyone on his behalf, except 4[illegible] crates which were afterwards sold by Abets and never received by plaintiff, but which the jury in assessing damages credited the defendant. It was sufficiently proven that Abets received some 65[illegible] crates, that approximately 24[illegible] were used by him in cerrating his crop, that about 2666 were sold by him to another party, and 16[illegible] in another lot to still another party, and that these were sold direct from the Abets farm to the premises of these purchasers.

The main defense offered at the trial was the return of the crates by Abets under the agreement of June [illegible], 1911, and the jury could reasonably find that defense unavailing.

As the contract of June [illegible], 1911, was for want of consideration, we do not think so. The consideration was the agreement on the part of the defendant to accept back the Abets crates provided they were returned to the onion platform at Asherton, and to release the defendant from liability

therefor. A further answer to the claim that this contract is void is that defendant introduced this in evidence and relied upon it as tending to establish its defense. Even should this written agreement be considered void, defendant would still be liable for these crates under his contract of purchase made with Mr. Butcher in March, 1911.

There have been two trials of this case, in both of which the juries have found the facts to be contrary to the claim of defendant. We see no sufficient reason to disturb the present verdict, and the judgment is affirmed.

AFFIRMED.

313 - 20642

CITY OF CHICAGO,
Defendant in Error,

vs.

EMILY MARSHALL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

1951 I.A. 245

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was fined on a complaint of violating section 2015 of the municipal code of the City of Chicago, in that on July 2, 1914, she was the keeper of a disorderly house. In this court she contends (1) that the evidence does not sustain the allegations of the complaint, and (2) that the finding of the court is against the weight of the evidence.

It is unnecessary to narrate the testimony except to say that it disclosed conduct of a women inmate of the house of the defendant which, together with defendant's admissions of three former convictions of keeping a disorderly house, was sufficient to justify the finding of the court. While some of the testimony is denied by the defendant, we will be guided by the better opportunity of the trial judge to observe the witnesses and pass upon their credibility.

The judgment is affirmed.

Affirmed.

ALBERT ROTHBAUM and MENDEL ASTRAHAN, doing business as ROTHBAUM & ASTRAHAN,
Plaintiffs in Error,

vs.

HENRY LEVY,
Defendant in Error.

MUNICIPAL COURT OF CHICAGO.

1951 I.A. 246

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit against defendant claiming $200 on the following contract:

> "This agreement, entered between Henry Levy, party of the first part, and Nathan Smelnitzky and Louis Astor, parties of the second part; Witnesseth: Whereas, said parties have assigned a certain judgment in favor of themselves against Annie Perlman for the sum of $650, of which sum $150 are due to Levy & Levy for legal fees, and in consideration of the said assignment the said Henry Levy, assignee, hereby undertakes to pay the $500 to the following persons: Sam Leviton, lumberman, the sum of $300 or less; Rothbaum, on account of judgment $200 or less, and the balance to the North Side Sash and Door Co.
>
> Witness our hands and seals this 29th day of April, 1913.
>
> HENRY LEVY,
> N. SMALINSKY,
> LOUIS ASTOR."

The trial court permitted to be introduced (1) parol evidence tending to show that this contract was not to take effect until Louis Astor had paid defendant a certain sum of money; (2) evidence that the contract was not delivered to Smalinsky and Astor; (3) also that there was no judgment against Annie Perlman at the time this contract was executed, and (4) that the defendant did not collect any money on said judgment. The trial court found against the plaintiffs.

Parol testimony under point No. 1 was inadmissible. As to point No. 2, it was not necessary to the validity of

the contract that it should be delivered to Smalinsky and Astor. It was permissible to show the facts with reference to the alleged judgment against Annie Perlman, and also as to what amount was paid thereon.

It appears that while at the date of this contract there was a verdict against Annie Perlman for [illegible], subsequently, under the suggestion of the trial court, it was remitted to $420 and judgment entered for that amount, which was paid. The contract contemplated the payments to be made by defendant when the judgment against Annie Perlman was paid. Out of this judgment was first to be paid $150 due to Levy & Levy for legal fees, and the defendant undertook to pay the balance to the persons named in the contract. The judgment being for $420, after $150 was paid would leave $[illegible], and as it appears that Rothbaum, plaintiff herein, was to be paid the same amount as was Levitan, plaintiff in another suit consolidated with this one for hearing, defendant could owe plaintiffs herein one-half of $270, which is $[illegible].

The judgment entered by the court below is reversed and judgment is entered in this court against the defendant for $[illegible].

REVERSED AND JUDGMENT IN [illegible] OF [illegible].

392 a [illegible]

[illegible] COMPANY, a corporation, Plaintiff in error, vs. [illegible], Defendant in error.	[illegible] [illegible] OF [illegible] CO.

1951.A.248

Mr. PRESIDING JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This cause was come ridated for hearing [illegible], 20[illegible], [illegible] an opinion has this day been filed. The suit arises out of the contract set forth in that opinion, and the same reasons for reversing the judgment in that case obtain in the present case. Plaintiff in this case was entitled to judgment for [illegible].

The judgment of the lower court is reversed and judgment for the plaintiff is entered in this court for $1[illegible].

JUDGMENT REVERSED AND JUDGMENT IN THIS COURT.

511 - 20844

ARTHUR HOFMAN,
Appellee,

vs.

CHICAGO LEAGUE BALL CLUB,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 249

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment obtained by plaintiff for $2,944.47 in an action to recover a balance of salary claimed under the contract of employment with defendant.

Plaintiff is a professional baseball player, and the defendant is engaged in giving exhibitions of games of baseball with a club known as the Chicago National League Baseball Club, which plays with other clubs of the National League of Professional Baseball Clubs, in Pittsburg and other cities.

On February 23, 1911, plaintiff entered into a written contract with defendant by which it was agreed that plaintiff should play ball for defendant and for no other party, except with defendant's consent, during the series of 1911 and 1912. He was to receive a salary of $5,000 a year in semi-monthly installments, and an allowance for uniforms, traveling expenses, etc. The baseball season was to begin about April 12th and end about October 12th of each year. The contract also provided that defendant might give plaintiff ten days' written notice to end its obligation under the contract. Plaintiff entered into the service of defendant and played during the season of 1911, and during 1912 up to May 30th.

The parties have stipulated the following facts as if proven: that on May 29, 1912, the defendant and the Pittsburg club made an exchange of players under terms set out in certain

telegrams and letters. In brief, these contain an arrangement for the Chicago Club to trade the plaintiff and another player to the Pittsburg Club for two of its players, and in a letter dated May 29th to defendant from the Pittsburg Club the latter club says: "The Pittsburg Athletic Company will, of course, assume the contract which the Chicago League Baseball Club now has with Mr. Hofman and Mr. Cole." One of the stipulated facts is "that the Chicago League Ball Club contract with Hofman was duly assigned to and accepted by the Pittsburg Athletic Company by the defendant, and approved by the president of the National League of Professional Baseball Clubs."

On May 30th defendant wrote to plaintiff in part as follows:

> "Mr. A. T. Hofman,
> West Side Ball Park, City.
> Dear Sir:-
> This is to inform you that your services have been released to the Pittsburg Club of the National League, to take effect immediately, and Manager Clarke of that Club requests that you report to him at Philadelphia in time for Saturday's game.
> Your contract with the Chicago Club has been assigned over to the Pittsburg Club and will be carried out by that Club."

There is no evidence of any knowledge on the part of plaintiff of anything pertaining to the exchange other than that imparted by this letter. Plaintiff thereupon went to Pittsburg and played with that club. No written contract was made between him and the Pittsburg Club, but it paid him sums of money from time to time to the end of the season, aggregating $697.47, which is less than the salary he was to receive for the same period under the Chicago Club contract by $2,944.47, which is the amount of the judgment herein. Plaintiff asked the president of the Pittsburg Club for more money but was told to collect from the Chicago Club as his contract was with it and not with the Pittsburg Club. After demand on the Chicago Club this suit was brought for the salary under the Chicago contract less the amount re-

ceived from the Pittsburg Club.

In defense it was claimed that there was a novation of the contract, the original contract between plaintiff and defendant being extinguished and its place taken by a new contract between plaintiff and the Pittsburg Club.

It is said that in every novation there are four essential requisites: (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one. Hayward v. Burke, 151 Ill. 121. Considering only the second of these requisites - there may be some question as to whether the Chicago Club and the Pittsburg Club assented to the extinguishment of the old contract, but there is no evidence whatever that plaintiff assented thereto. There was no express assent on his part, and the only thing he did from which his assent might be implied was to report to and play with the Pittsburg Club; but this conduct cannot be considered as evidence of his assent, for under his contract with defendant he was obligated to play ball "at such reasonable times and places as said party of the first part (defendant) may designate." The defendant had designated the Pittsburg Club as the place where plaintiff should play, and his obedience to instructions and the contractual agreement was entirely consistent with the continuance of his contract. Furthermore, there was a provision in his contract to the effect that before the defendant could "end and determine all its liabilities and obligations under this contract" ten days' previous notice should be given to plaintiff. No such notice was given. There being no evidence of plaintiff's assent to the cancellation of his contract with the defendant and a new contract between himself and the Pittsburg Club, the defense of novation fails as a matter of law.

Complaint is made that the attorney for plaintiff upon the trial read to the jury portions of the plaintiff's Statement of Claim which were immaterial, parts of which tended to prejudice the jury adversely to the defendant. We are not informed under what authority the contents of a Statement of Claim may be read as evidence to the jury. It was error to deny defendant's motion to strike out certain portions of plaintiff's Statement of Claim, and it was error to read them to the jury; and were a close question of fact involved such errors would compel a reversal. However, as indicated, we hold as a matter of law that there was no novation, and the judgment is affirmed.

[illegible].

675 - 21013

ESTHER MANN,
Appellee,

vs.

HENRY A. BLAIR et al.,
as Receivers of Chicago
Railways Company,
Appellants.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

19 I. A. 254

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $3,000 obtained by plaintiff because of injuries said to have been received by her while a passenger on one of defendants' street cars, through its negligent operation.

The testimony shows that as the car was proceeding along the street there was a burst of flame from the controller, and panic followed, causing injuries to some of the passengers, including plaintiff. Defendant does not claim that the verdict on the question of liability is against the weight of the evidence. The closely contested point concerns the extent of plaintiff's injuries, with special reference to whether the injury caused her to suffer from epilepsy. The evidence on this point was contradictory and under such circumstances the rulings of the trial court upon the admissibility of evidence will be strictly scrutinized by a court of review, and the judgment reversed if any inaccuracy has occurred in such rulings which may have operated to the prejudice of the losing party. C. C. C. C. C. Co. v. Monworth, 203 Ill. 192.

On behalf of the defendant Dr. Frohn, basing his opinion on his experience, testified that plaintiff

could not have suffered epilepsy as the result of the accident in question, saying, "fright does not produce epilepsy." The attorney for plaintiff, after having identified through the witness a book on nervous diseases written by a Professor Starr, asked whether Professor Starr did not say in his book that "about one-half of the cases of epilepsy is caused by fright." Questions to the same import were repeated and so framed as to appear to be statements of what was contained in Starr's book. Objections were made and overruled and exceptions taken. At the conclusion of the taking of testimony plaintiff's attorney exhibited the book to the court and jury and stated, in effect, that he proposed to show by Professor Starr's book that it was therein stated that epilepsy may be caused by fright.

In Ullrich v. Chicago City Ry. Co., 265 Ill. 338, just such questions by the plaintiff's attorney was held to be ground for reversal. In that case, as here, the medical witness based his opinion upon his own personal observations and not upon what was said by writers of text books. The court in its opinion said:

> "The law is well settled in this State that scientific books may not be admitted in evidence before a jury, and that such books cannot be read from to contradict an expert witness except where such expert assumes to base his opinion upon the work of a particular author, in which case that work may be read in evidence to contradict him."

In City of Bloomington v. Shrock, 115 Ill. 219, this question was involved and the authorities reviewed at length, and it was there so held, the court saying:

> "Since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory."

And in the Ullrich case, supra, the language used is especially applicable to the circumstances of the present case:

> "In the case at bar counsel did not offer any of the medical works which he pretended to have before him and which he used in the cross-examination of these witnesses, but he cannot be permitted to do indirectly that which he is not allowed to do directly. He succeeded in conveying the impression to the jury that these two witnesses were testifying against recognized authority on the subject of hysteria, and that is the only purpose which we can perceive counsel could have had in the use he was making of these various medical books. The cross-examination of these witnesses was improper and constitutes reversible error."

The cross-examination in the case before us and the conduct of plaintiff's attorney and his statement before the jury constitute reversible error.

Complaint is made of instruction No. 9 at plaintiff's request, which told the jury that in weighing the evidence it should take into consideration the fact that certain witnesses were in the employ of the defendant. This instruction was misleading and should not have been given, for reasons stated in the opinions in Bennett v. Chicago City Ry. Co., 243 Ill. 420; Lowers v. Chicago City Ry. Co., 185 Ill. App. 158; and Ovens v. Chicago City Ry. Co., 171 Ill. App. 647.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

66 - 20510

F. J. HAGGARTY COMPANY, a corporation,
Defendant in Error,

vs.

M. G. CONLEY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment recovered by the F. J. Haggarty Company, a corporation, defendant in error here, for $75 alleged to have been overpaid by mistake to defendant Conley, plaintiff in error here. Conley claimed a set-off of $911.50.

Frank J. Haggarty for some years prior to January 31, 1911, was a partner with his father in the teaming business under the name of F. C. Haggarty & Son, and on that day the firm was dissolved and F. C. Haggarty took all the property and assets of the firm. From January 31 to April 13, 1911, Frank J. Haggarty did some teaming business on brokerage, but had no teams, wagons, trucks or other assets of his own. April 14 a corporation was organized under the name of F. J. Haggarty Company, with an authorized capital of $5,000. F. J. Haggarty subscribed for $2500 of the capital stock, F. J. Hall for $2400, and John Kercher for $100. Frank J. Haggarty's wife paid for the $2500 stock subscribed for by him, and $2400 of the stock was transferred to her. Hall and Kercher paid for the stock subscribed by

them respectively. Neither Mrs. Haggarty, Hall nor Kercher were interested in or in any way connected with the teaming business carried on by Frank J. Haggarty prior to the organization of the corporation.

Points relied upon by plaintiff for reversal are: 1st. Where an organization or association of persons take a name which imports a corporate existence and do business and contract under that name, they will be estopped to deny that they are a corporation. 2nd. That where a corporation is a mere continuation of the same business previously transacted by the same parties, it must be presumed to be bound by the obligations which such business is liable for. The correctness of the propositions of law stated by plaintiff in error is not disputed; but the contention of defendant in error is that the facts disclosed do not bring the case within the rules of law so stated.

The first proposition is clearly not applicable, for there is no proof in the record that there was an organization or association of persons doing business under the corporate name prior to the receipt of plaintiff's charter from the Secretary of State. Neither Hall, Kercher nor Mrs. Hall had anything to do with Haggarty's brokerage business from January 30 to April 14, 1911, but he conducted that business alone. Neither does the second proposition apply, for the plaintiff corporation was not, under the evidence here, "a mere continuation of the same business previously transacted by the same parties." Haggarty conducted his brokerage teaming business alone, and the corporation consisted of four stockholders, and it cannot be said that these stockholders were the same parties who conducted the

brokerage teaming business prior to the organization of the corporation. The amount paid by the corporation to Conley was $75 in excess of his charges for services rendered to the corporation, and the Court properly gave judgment for the plaintiff for that amount, and it is affirmed.

AFFIRMED.

176 - 20490

FRIEDRICH WEINZ,
defendant in error,

vs.

[illegible] CORPORATION,
a corporation,
plaintiff in error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1951 A. 265

Mr. Justice [illegible] DELIVERED THE OPINION OF THE COURT.

Weinz, defendant in error here, brought suit in the Municipal Court to recover $351 from the defendant corporation, plaintiff in error here, paid by him on a contract entered into April 1, 1963, for the purchase of certain real estate of the defendant for the sum of one thousand dollars. Plaintiff was a minor at the time the contract was entered into, and the court gave him judgment for the amount claimed, and to reverse such judgment this writ of error is prosecuted.

The trial began February 1[illegible], 1914. Plaintiff was called as a witness in his own behalf, was examined and cross-examined, and the further hearing of the cause was then postponed to February [illegible]. It was further postponed to April 3. April 1, defendant's attorney gave notice to plaintiff's attorney that he desired to further cross-examine plaintiff, and if not produced, he would moved to strike out his testimony. He was not produced. Defendant's motion to strike out his testimony was denied, and it is strenuously contended that in this the court erred. It was a matter of discretion whether the court would permit defendant to call plaintiff for further cross-examination, and a refusal to permit him to be recalled cannot be assigned for error.

Brown v. Berry, 47 Ill. 175;

Iron Co. v. Coleman, 237 Ill. 149.

We do not regard the refusal of the court to permit plaintiff to be recalled for further cross-examination as an abuse of the discretionary power vested in the court.

Plaintiff became of age December 12, 1913. In April, 1914, and again in October, 1914, he informed the defendant that he did not want to keep the land and demanded his money back. The land was not conveyed to the plaintiff, but a contract of purchase and sale was entered into. Defendant offered to repay him $75 of the $251 that he paid, but he declined the offer. We think that from the evidence the Court might properly find that the plaintiff disaffirmed the contract within a reasonable period after arriving at age.

The record is in our opinion free from error, and the judgment is affirmed.

Affirmed.

407 - 20738
408 - 20739

BERT S. BARBER,
Plaintiff in Error,

vs.

TRAVELERS INSURANCE COMPANY,
Defendant in Error.

MARION BELLE BARBER,
Plaintiff in Error,

vs.

TRAVELERS INSURANCE COMPANY,
Defendant in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

1951.A.270

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review judgments of the Municipal Court for the defendants in two cases, each on an "accident" policy of defendant Company issued to Lyman W. Barber. The beneficiary named in one of the policies was Bert S. Barber; in the other, Marion Belle Barber. The cases were consolidated for hearing on the same evidence and submitted to the Court without a jury and judgment in each case given for the defendant. A former trial of the same cases on the same evidence, with the exception of the testimony of Irma Palmer and Mildred Shippey, whose testimony was first introduced on the present trial by defendant, resulted in judgment for the respective plaintiffs, which was reversed by this Court and the causes remanded. Barber v. Travelers Insurance Co., 165 Ill. App. 389. In the opinion there filed the pleadings and questions involved are fully stated and need not be here repeated. The policy provided, "That this insurance shall not cover death * * * resulting wholly or partly, directly or indirectly from intoxication or while intoxicated." The defense on both

trials was practically that the assured at the time he came to his death was intoxicated. He left his office in the Old Colony Building at Van Buren and Dearborn streets, in the business district of Chicago, about six o'clock P.M. of January 4, 1908, went to a saloon and remained three-quarters of an hour, had there one or two drinks of whiskey, then went to supper at a restaurant and after supper went back to the saloon and had more whiskey and also drank beer; about nine o'clock he with two or three friends went to another saloon and then to the "Savoy", where they remained an hour or longer, and the assured drank beer; then about eleven o'clock he with the others went to a house of ill-fame in the "red light" district, where the assured had beer; a little later they went to Mrs. Park's house of the same class in the same district, at 2111 Dearborn street, and there remained two hours or longer and the assured drank beer; he went up stairs with Mildred Shippey, an inmate, and, according to her testimony and the testimony of two other inmates of the house, was then intoxicated, vomited and had to be helped up and down stairs; about 1:30 A. M. either the assured or Mildred Shippey called a cab by telephone and he got into it with the witness Hegner and went to a saloon nearby; they then went to "The Bells", another house of ill-fame; when they came out from "The Bells" they took a girl into the cab and took her to her home, 2333 Cottage avenue, three blocks south of the saloon from which they started and in the direction of the assured's home; the girl left the cab at her home and the assured and Hegner went in the cab to the Old Colony Building, nearly two miles north of the place where the girl left the cab; the assured had no

money when he was in Mildred Shippey's room, and when he reached the Old Colony Building he proposed to go up stairs to the eighth floor and get some, but did not do so; he dismissed the cabman, walked up stairs to the elevated railway station, borrowed 25 cents from Lagner, and took a southbound elevated train at 3:30 A. M. His dead body was found the next morning under the elevated railway station at the 28th street station, and it is clear that he fell from the car on which he was riding at that place and was thereby killed.

The defendant called five physicians and propounded to each the same hypothetical question. It is not contended that the proper facts were not embodied in the question, and the question seems to state quite fully the appearance, history and actions of the assured from six o'clock P. M. of January 4th until half past three o'clock the next morning, and includes the assumption that he staggered, was unable to talk coherently, spoke only a few words and those merely in monosyllables. The question asked was: "Assuming the facts stated in the question, have you an opinion as to whether that man was or was not intoxicated about 4 A. M. the next morning?" Over the objection of plaintiff the question was permitted to be answered, and the answer by each physician was in substance that he had an opinion that the man was intoxicated and that the intoxication would probably continue three or four hours from four o'clock. One of the contentions of the defendant is that the court erred in permitting the hypothetical question to be answered. We think that these questions, though in form subject to criticism, were in substance as to the effect or result of alcohol on the system and was long the intoxi-

cation would continue under the facts and circumstances stated in the question, and that so considered, the Court did not err in permitting the questions to be put and answered.

The principal contention of plaintiff in error is that the death of the assured did not occur when he was intoxicated. In this contention we cannot agree, but think that from the evidence the Court might properly find that the assured came to his death while intoxicated, and therefore properly gave judgments for the defendant.

In our opinion the record is free from reversible error and the judgment is affirmed.

Affirmed.

83 - 2639c

NEW IDEA ARC LIGHT Co.,
a corporation,
Plaintiff in Error,

vs.

G. C. HERRINGER Co.,
a corporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1951.A.290

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This action is upon three written contracts for the sale by plaintiff to defendant of thirteen electric lamps at the price of $15.00 each, payable in certain instalments. The lamps were installed and $24.00 paid on the total purchase price of $195.00. Defendant contended that the lamps did not perform the work for which they were bought, and counter-claimed against plaintiff's claim the $24.00 it had paid on account. The trial judge found the issues for the defendant on the counter-claim and gave judgment in its favor for $24.00, and plaintiff prosecutes this writ of error in an effort to reverse the judgment.

The three written contracts in evidence control the rights, duties and obligations of the parties to each other. While the rights of the parties must be adjudged within the terms of these contracts, in which there can be neither eliminations nor additions, yet the Court is permitted, under well settled rules of law, to see from by evidence the relation of the parties to one other at the time of the making of the contracts, for the purpose of enabling the Court to construe the contracts in that light. With this rule in mind we find from the evidence that the plaintiff was a manufacturer of arc lamps contracted to be

sold to defendant; that defendant operated printing presses which caused considerable vibration, and that the lamps which defendant was using were often broken by reason of the vibration; that it was represented to defendant at the time of the sale that plaintiff's "New Idea" lamps would withstand the vibration without breaking; that the lamps sold were to take the place of the ones then in use, which were discarded and the "New Idea" lamps installed in their stead; that the "New Idea" lamps did not fulfill the purpose for which they were bought and which plaintiff knew they were intended to serve; that the new lamps did not withstand the vibration caused by the running of the presses, but constantly broke so that they could not be used successfully to light the presses.

Defendant offered to return the lamps and demanded that the instalment of $24.00 paid to plaintiff be returned to it. Plaintiff refused either to pay the $24 or receive back the lamps, and defendant thereupon put the lamps in storage and notified plaintiff of that fact.

While there is no warranty found in the contracts that the lamps were suitable for any specific purpose, the evidence conclusively proves that plaintiff knew the use to which the lamps were to be put by defendant. In these circumstances, the principle applies that when a manufacturer of commodities sells them for a specific purpose, the law implies a warranty upon the part of the manufacturer-seller that such commodities are reasonably fit for the use for which they are intended. This principle is well stated in Ridgerwood Mfg. Co. v. Robinson, 188 Ill. App. 431, in which case the court say:

"Though a contract is in writing and no warranty expressed, one may be implied, for the implied warranty is not based on a supposed agreement of the parties, but it is an obligation imposed by law."

In Andsen v. Cordell, 188 Ill. App. 504, it was held that where a manufacturer contracts to supply an article which he manufactures for a particular purpose, so that the purchaser necessarily trusts to the judgment or skill of the manufacturer, there is an implied warranty that the article shall be reasonably fit for the purpose to which it is to be applied.

The Court below correctly applied this principle of law to the facts in the record, and the judgment of the Municipal Court is therefore affirmed.

Affirmed.

217 - 20539

William J. Kelly,
Defendant in Error,

vs.

Mary E. Good,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

1951.A.295

Mr. Justice Wilson delivered the opinion of the court.

The motion of appellee to strike the statement of facts from the record, reserved to the hearing, is denied.

The parties to this litigation are landlord and tenant, Kelly, the plaintiff, being the landlord, and Mrs. Good, the defendant, being the tenant. Plaintiff, claiming that defendant owed him for rent $114, issued his distress warrant to A. McCarthy and Fred Klein en, and, while they do not appear to have executed the distress warrant, certain personal property of defendant was distrained and two custodians placed in charge of it. Defendant in her affidavit of merits asserts as a defense to $85 of her landlord's claim, that she gave her note for $60 in settlement of that amount of rent, and that the only rent due and unpaid at the time of levying the distress warrant was $29. A trial before the court resulted in a judgment for $114, the sustaining of the right of the plaintiff to levy the distress warrant, the taxing of costs at $6 for appraiser's fees and $42 for custodian fees, and ordering special execution against the property distrained as well as a general execution.

Mary E. Good, the defendant, testified that she settled with one J. A. Ruess, the agent of defendant, for the rent due to February 1, 1914, by giving to him her note for

$85. The giving of this note is admitted, but through Lucas, his agent, plaintiff denies that it was given in payment of rent, and asserts that he destroyed the note and did not therefore have it in his possession. On the question of the giving of the note in payment of the rent, the trial judge seemed to be in doubt and expressed a wish to have plaintiff present in court for interrogation as to whether it was received in payment or as collateral. Thereupon Lucas stated, "I cannot bring in the landlord, for the reason that the landlord is absent from the city; Kelly is a traveling salesman and he is in Texas." When the plaintiff was produced in court he testified that at the former hearing he was at home and that Lucas told him to stay at the premises rented to defendant and not to allow any one to enter them, and that "when Mrs. Good returned to the premises I did not allow her to enter."

The pertinent question for our determination is, was the $85 note given and accepted as payment for rent due from defendant to plaintiff to February 1, 1914. Defendant swears it was, and Lucas, plaintiff's agent, swears it was not, and this is all the testimony in the record concerning it. In passing upon the weight of the evidence we cannot lose sight of the fact that Lucas made a false statement to the Court, knowingly and intentionally, regarding the whereabouts of Kelly. When the Court asked him to produce Kelly in court he stated that he was in Texas. Kelly thereafter testified, and was not contradicted by Lucas, that Lucas told him to stay at the premises and not to allow any one to enter them. The conduct of Lucas, above recited, discredits his testimony. He is in the position of a witness who has been impeached and is therefore not entitled to be believed

except when corroborated by other credible evidence. Thus measured, the testimony of defendant regarding the giving and acceptance of the note is controlling. We therefore find that at the time of the levying of the distress warrant in this case defendant was indebted to the plaintiff for rent in the sum of $29 and no more.

The judgment of the Municipal Court is therefore reversed and judgment entered here in favor of plaintiff and against defendant for the sum of $29, plaintiff to pay the costs of this Court and of the Municipal Court, including custodian and appraiser's fees.

REVERSED AND JUDGMENT HERE AGAINST DEFENDANT FOR $29.00/100.

278 - 20580

[illegible] HEATING & [illegible]
CORPORATION,
Plaintiff in Error,

vs.

[illegible] & [illegible],
a corporation,
Defendant in Error.

[illegible] OF THE [illegible]
OF COOK COUNTY.

195 I.A. 297

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

The defendant, the general contractor for the building of the "Iris Theatre" at No. 5745 West [illegible] avenue in Chicago, on the 26th day of November, 1916, entered into a contract with plaintiff for the installing of a heating and ventilating plant in said "Iris Theatre." The contract price was $[illegible], which was to be paid, $[illegible] "when boiler and radiators are delivered on the premises," a like amount "when steam is turned on plant," and the remainder "twenty days after plant is completed, tested and accepted by superintendents." The amount involved in this suit is the $[illegible] payable "when steam is turned on plant." The defenses interposed are that plaintiff was neither complied with nor completed its contract; and no money is due plaintiff under the contract and that plaintiff has failed to comply with the mechanic's lien law of the State. The hearing was before the court, who found the issues for the defendant and entered a judgment of nil [illegible] and for costs against plaintiff, and prays this writ of error in an effort to reverse that judgment.

The first payment of $[illegible], [illegible] with the contract [illegible] dispute. The first contention of plaintiff [illegible]

payment of the sum here demanded, "when steam is turned on plant," means, by interpretation, when steam is generated in the boiler, circulates through the steam mains and branches leading to the radiators, with steam in the radiators, and the plant is in operation. Plaintiff maintains that the term "when steam is turned on plant" is a trade term, having a significance known to the trade, which significance, under well settled principles of law, is to be ascertained and followed as entering into the contract and as being presumably known to the parties at the time the contract was made. The parties introduced evidence of witnesses to sustain their respective contentions.

Parol evidence is admissible to show that certain words and phrases used in a contract have a well known and established meaning among dealers engaged in the class of trade which is the subject of the contract. Steiotmann v. Joseph May Co., 254 Ill. 84. However, as both parties proffered evidence sustaining their several contentions as to the trade meaning of the disputed phrase, neither party can avail of any objection to such evidence on appeal.

A careful weighing of the evidence on this contention demonstrates to our minds that the clear preponderance of such evidence is with plaintiff. It further appears that the plant was in operation and performed its function within the time stipulated in the contract. The court in its statement of findings on this issue also found that the steam was turned on the plant about December 15, 1915, and the evidence shows that steam was turned on on all the radiators two days thereafter, and that this delay of two days as to one of the radiators was caused by other contractors not having made the recesses in which said two radiators were to be placed; so that at the time plaintiff made the demand for the second

$1,000 payment in suit which it demanded of defendant, it was entitled to have satisfied.

But it is urged by defendant that plaintiff should have procured a certificate of the superintendent that the $1,000 demanded was due. A complete answer to such contention is that the contract between the parties does not so provide. The only reference found in the contract regarding obtaining a certificate for the several payments relates to the final payment; but who shall give the certificate is not there stated. The only other reference to certificates for payments appears in article 5 and relates solely to damage incurred by the owner through certain enumerated defaults on the part of the contractor, and has no relation to this controversy. In this article "the superintendents" are designated as the persons to give the certificate.

As plaintiff had performed the work called for in the contract entitling it to the second payment demanded, it was entitled to receive it without procuring any certificate. However, when demand was made for the payment, defendant claimed that plaintiff was not entitled to any further payment than those already made, until the work specified in the contract was completed; and, again, that the money to make the payment was not available. These claims are inconsistent. Defendant breached the contract by not making the payment of the second $1,000 here in suit as provided by the contract, and plaintiff for this cause had a right to abandon the contract and to refuse to do the work under it, which right it exercised.

Defendant finally contends that plaintiff should have rendered the verified statement required by section 5 of the Mechanic's Lien Act as a condition precedent to entitle it to the payment demanded. This section applies to

contractors, and as plaintiff was a sub-contractor it has no application. Section 62 of the Act, however, does apply to plaintiff. But by Section 22 sub-contractors are not required to make such verified statements unless requested by the contractor or owner in writing. No such request was made until after plaintiff had abandoned the contract for defendant's breach of it, and the letters afterward written again such request should not have been admitted in evidence against the objection of plaintiff.

For the errors in this opinion indicated, the judgment of the Municipal Court is reversed and judgment entered in this Court for $1,[illegible] in favor of plaintiff and against defendant.

REVERSED AND JUDGMENT [illegible] $1,[illegible].

370 - 20700

G. W. [illegible] and [illegible],
trading as [illegible],
Defendants in Error,

vs.

[illegible],
Plaintiff in Error.

Error to the [illegible]
of Cuyahoga.

195 LA. 299

[illegible] Judgment affirmed [illegible].

This is a confession of judgment, under power of attorney so to be contained in a lease in which plaintiffs are lessors and defendant is lessee, for the use of [illegible].

Defendant made a motion to be let in to defend, which motion the court denied, and defendant prosecutes this writ of error.

Defendant in his affidavit, upon which he grounds his motion to be permitted to defend, sets up that he was in his business carried on in the demised premises and received the lease to sign [illegible], and that a clerk of the agent of plaintiffs accepted a surrender of the lease and of the demised premises and accepted possession as tenant in defendant's stead. Defendant also set up that there have been material alterations in the lease, since he saw and not disclosed. The granting of leave to defend after a motion in a matter addressed to the sound discretion of the court, and unless it can be [illegible] a court of review will not disturb the action.

[illegible] the lease and [illegible] after its execution [illegible] defendant. [illegible] any one having [illegible] the [illegible]. The lease may be [illegible] surrender of the lease

by its assignment to Moskowitz. It is not claimed by defendant that such surrender was by authority emanating from the plaintiffs. It is the law that notwithstanding an assignment of a lease to a third party, the lessee still remains liable for the rent payable under it unless relieved from that responsibility by the landlord or some one acting under his direction. Sexton v. Chicago Storage Co., 128 Ill. 216. As it does not appear that defendant had been released by plaintiffs or any one lawfully acting for them from his liability to pay rent under the lease, defendant remains liable therefor.

The question of the materiality of an alteration or change in a written document is one of law for the court, not one of fact for the jury. Milliken v. Marlin, 66 Ill. 13; Cook Brewing Co. v. Goldblatt, 184 Ill. App. 256.

The judgment of the Municipal Court, being without error, is affirmed.

AFFIRMED.

535 - 20868

JOHN F. DEVINE, Administrator of the Estate of DAVID KAUFMAN, Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY, Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

195 I.A. 304

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court rendered on the verdict of a jury for $3,000 in an action against defendant for negligently causing the death of plaintiff's intestate.

The errors relied upon for reversal are two: - That the verdict is contrary to the manifest weight of the evidence, and the admission of improper evidence. The plaintiff's intestate, at the time of suffering the injuries which it is claimed resulted in his death, was seventy-one years of age. An autopsy disclosed that at the time of his death certain of his internal organs were diseased, including his heart, kidneys and stomach.

Plaintiff contends that defendant's car, while at a standstill and taking on passengers, suddenly and without warning started while deceased was in the act of boarding it, with one foot on the running board, causing him to be thrown to the ground, inflicting injuries from which he shortly thereafter died.

To the contention that the finding of the jury is contrary to the manifest weight of the evidence, we are unable to yield our assent. A careful examination of the evidence con-

vinces us that the jury were justified in finding that the defendant's servant was negligent in starting the car before plaintiff's intestate had a reasonable opportunity to board it. The probabilities of the situation all strongly tend to establish that fact. The deceased was with his wife and other friends, all of whom were boarding the car, and all but deceased succeeded in so doing without accident. All these persons, including the deceased, were in clear view of the conductor and their purpose of boarding the car while it was stationary was apparent. In these circumstances it was the duty of the conductor not to start the car until all these persons were safely on the car, and to give them all sufficient time to do so. Failure in this regard was actionable negligence. For the injuries resulting to deceased from such negligence defendant is liable to respond in damages.

But it is insisted that the preponderance of the evidence proves that deceased died as the result of one or more of the several serious diseases with which the autopsy upon his body showed he was afflicted and that such diseases had, at the time deceased fell from the car, reached "the terminal stage." We do not think that the jury, in the light of the evidence before them, would have been justified in so finding. While some of the deceased's vital organs were diseased, there is no evidence in the record justifying the conclusion that the "terminal stage" of life had been reached or that death would have naturally ensued without the intervention of the shock to his system proximately attributable, as testified by credible medical witnesses, to his fall from defendant's car. There is no evidence that deceased was consciously suffering from any fatal malady on

the day of his death or that he had complained of any particular physical distress. At the time of the accident he was going about his usual affairs and was on his way to visit at the house of a friend. His widow testifies that he had not been recently treated by a medical man and had not taken to his bed on account of sickness for more than five years prior to his death. These facts appear from her testimony: "Before this accident my husband looked well and seemed perfectly well. * * * I do not know of my husband being under the doctor's care before this accident for anything except - I guess it is ten or fifteen years ago. * * * Before this accident he was not in bed. I am sure not in five years, for any cause."

Bearing in mind the fact that deceased was seventy-one years of age at the time of the accident, exceeding by one year the span of life alloted by the psalmist, the jury might well have believed the medical testimony of the plaintiff's medical witnesses that the condition of deceased's heart and kidneys was due to arterio sclerosis and that these conditions were such as might be expected in a man of deceased's age, and that they were not such as would tend to shorten his life, and to conclude therefrom, as from their verdict they assumedly did, that deceased's fall, with the shock resulting therefrom, was the proximate or contributing cause of his death.

Objections were made to certain questions put to and answered by one of plaintiff's medical witnesses, and it is argued that they invaded the province of the jury, to determine the facts. In determining the propriety of this evidence it must not be lost sight of that the witness was testifying regarding a past occurrence - what really existed as distinguished from what might result from conditions found. The

questions involved the fact as to whether shock caused edema of the lungs, which edema was the immediate cause of death.

It was not disputed but that the immediate cause of death was edema of the lungs. To ascertain whether the shock resulting from the fall caused that condition was pertinent. It could not be assumed that either jurors or Judge were competent to decide that question. It therefore became necessary to call for expert opinion - the opinion of medical men having knowledge of that subject. It was competent for such a witness to give his opinion as to the cause of the edema of the lungs which resulted in death.

This case is not comparable to Lyons v. Chicago City Ry. Co., 258 Ill. 75, where the physician testified that his opinion was that the injured party "might have a fracture. **" Here the testimony was that shock caused edema of the lungs and that the edema caused death. There was no uncertainty in this opinion. It was absolute and unqualified and was admissible even under the ruling in the Lyon case, where the court say: "A surgeon may testify as to the nature of the wound and as to the effects or consequences which may be reasonably expected to happen. * * If this physician had testified that from his experience in such matters his judgment was that there was a fracture, * * such evidence under the authorities might have been admissible, but when the testimony showed that his opinion was based on a mere conjecture, it was not admissible."

We do not regard the Lyon case, when analyzed, as either fortifying the contention of defendant or as detracting from that of plaintiff. Fahey v. Chicago City Ry. Co., 239 Ill. 548.

We think the claim of plaintiff that defendant cannot now be heard to complain regarding this opinion evidence, is

well taken, even if such contention were sound, for the reason that defendant introduced evidence of a like character. C. & A. R. R. Co. v. Jennings, 140 Ill. App. 195; Hart v. Manley Manufacturing Co., 116 Ill. App. 159; Kitzel v. Firenough, 251 Ill. 199.

The record being free from reversible error, the judgment of the Superior Court is affirmed.

AFFIRMED.

682 - 21020

PASQUALINO DeVILCHEZZO, by next friend, Appellee,	
v.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
CHICAGO RAILWAYS COMPANY, Appellant.	

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This is an action on the case for personal injury suffered by plaintiff in being struck by a car of defendant while he was crossing the Sangamon Street viaduct from the east to the west side of the same. The accident is accounted for by plaintiff as due to dense smoke emanating from railroad engines passing under the viaduct which obscured his view of defendant's car. A trial before court and jury resulted in a verdict and judgment for $750, and defendant appeals.

The evidence is conflicting as to the exact place at which plaintiff crossed the viaduct. Defendant's witnesses place it somewhere near the centre of the viaduct; on the other hand, plaintiff and his witnesses place it as in the vicinity of the intersection of Lanzie and Sangamon streets near the south approach to the viaduct. This discrepancy we regard as immaterial to our decision. Plaintiff avers in his declaration the performance of the duty which the law cast upon him, in that he was in the exercise of due care for his own safety at and immediately preceding the happening of the accident. This averment it is essential for plaintiff to establish by a preponderance of the evidence before he is

entitled to recover, regardless of any negligence of which the defendant may have been guilty. It is apparent that the smoke from the railroad engines was not attributable to defendant. In the condition confronting plaintiff created by this smoke, he should have been cautious in crossing the street and should have been on the lookout for the approach of cars upon the tracks which were in the street. It was negligence in plaintiff to cross the street in the path of approaching cars without taking the precaution to observe the fact that a car of defendant was travelling toward him, and in not halting his progress to let it pass. The greater weight of the evidence conclusively demonstrates that plaintiff, in his attempt to cross the viaduct and the tracks of defendant through the dense smoke which he testifies was there present, was guilty of a lack of ordinary care for his own safety which, under well settled rules of law in this State, inhibits his recovering damages for the injuries which he suffered as the result of his own negligence.

Finding, as we do, that plaintiff was not in the exercise of ordinary care for his own safety at the time he suffered the injuries complained about, and that such want of care was the proximate cause of the accident and resulting injuries, the judgment of the Circuit Court is reversed.

Reversed with finding of fact.

(over.)

682 - 21020 FINDING OF FACT.

The Court finds that the plaintiff was guilty of negligence which was the proximate cause of the accident.

356 - 21753

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. RACLAY HOYNE, State's Attorney,
Appellant,

vs.

HARRY M. FISHER, Judge of the Municipal Court,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the People of the State of Illinois on the relation of Raclay Hoyne, State's Attorney, from an order of the Circuit Court denying relator leave to file a petition directed to Harry M. Fisher, a Judge of said Court, commanding him to grant leave to relator to file a criminal information against one Jacob L. Kesner, charging a violation of Section 24 of the General Revenue Law of the State, in refusing, neglecting and failing to file a schedule of his personal property with the Board of Assessors of Cook County for purposes of taxation, as required by law. The cause was submitted to the Court on a stipulation of the parties, whereby it was agreed that the facts set forth in the petition are correctly stated, and the parties submitted to the Court for decision, "the question of repeal of that portion of Section 24 of the 'Act for the Assessment of Property and for the Levy and Collection of Taxes' of 1872, as amended in 1879." The respondent demurred to the petition, his demurrer was sustained and the petition dismissed.

The only question presented for review by this appeal is: Is the provision in Section 24 of the General Revenue Law of 1872 as amended by the Act of 1879, making it a misdemeanor to refuse to list personal property, now in force, or has the provision been repealed by implication by

the Revenue Act of 1898, or otherwise? This question was before this Court in the case of The People v. Centaur Motor Co. of Illinois, in which the opinion was filed April 26, 1915, and was decided adversely to the contention of plaintiff in error. In that case we said:

"This writ of error brings in review a judgment of the County Court imposing a fine of $150 against the defendant, the Centaur Motor Company of Illinois, on an information filed by the State's Attorney in the name of the People charging that defendant refused and neglected to list and schedule its personal property for taxation between April 1 and June 1, 1914, in the manner and form required by law with the Board of Assessors of Cook County. Section 24 of the Revenue Act of 1872 was as follows:

'Persons required to list personal property shall make out and deliver to the assessor at the time required a schedule of the numbers, amounts, quantity and quality of all personal property in their possession, or under their control, required to be listed for taxation by them. It shall be the duty of the assessor to determine and fix the fair cash value of all items of personal property.'

"This Section was amended by the Revenue Act of 1879 by adding the following provision:

'Any person so required to list personal property who shall refuse, neglect or fail, when requested by the proper assessor to do so, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding $200, and the several assessors shall report any such refusal to the county attorney, whose duty it is hereby made to prosecute the same.' Laws of 1879, p. 253.

"The clause above quoted is the only provision in any revenue act making it a misdemeanor to refuse, neglect or fail to list personal property for taxation. The contention of the defendant in error is that the above quoted misdemeanor clause in the Act of 1872 as amended by the Act of 1879, was not repealed by the Act of 1898. This contention is based on Section 55 of the Act of 1898, which is as follows:

'All the provisions of the general revenue law in force prior to the taking effect of this act shall remain in force and be applicable to the assessment of property and collection of taxes except in so far as by this act is otherwise expressly provided.'

"The Act of 1872 is a general revenue act, contains 294 Sections, and many of its provisions remain unchanged. The Act of 1898 contains 59 Sections and relates exclusively to the assessment of property. Section 19 of that Act is as follows:

'The assessor shall require every person to make, sign and swear to the schedule provided for by this act. If

any person shall refuse to make the schedule herein required, or to subscribe and swear to the same, the assessor shall list the property of such person according to his best knowledge, information and judgment, at its fair cash value, and shall add to the valuation of such list an amount equal to fifty per cent of such valuation. Whoever in making such schedule shall wilfully swear falsely in any material matter shall be guilty of perjury and punished accordingly.'

"That the Act of 1898 was intended to provide a new system for the assessment of property and not to amend the general revenue Act in other particulars is shown by the provisions of the Act and it was so held in People v. Knopf, 183 Ill. 416, where it was said, p. 416:

'The Act of 1898, however, provides for an entire new system of making the assessment, and the basis of it, with new modes of procedure and a new system of review, and as to that subject it is substantially complete in itself, constituting an entire plan for the making of the assessment.'

"In People v. Thornton, 186 Ill. 162, it was said, p. 173:

'Where the legislature frames a new statute upon a certain subject matter, and the legislative intention appears from the latter statute to be to frame a new scheme in relation to such subject matter and make a revision of the whole subject, there is in effect a legislative declaration, that whatever is embraced in the new statute shall prevail, and that whatever is excluded is discarded. The revision of the whole subject matter by the new statute evinces an intention to substitute the provisions of the new law for the old law upon the subject. (Black on Interpretation of Laws, p. 116; Murdock v. Mayor of Memphis, 20 Wall. 590.'
People v. Freeman, 243 Ill. 152.

"If the contention of defendant in error is correct, then if the legislature desired to retain the penalties provided by section 24 as amended in 1879, it was not necessary to provide any penalty for the refusal to list property. That contention is that the penalties provided by the Act of 1879 were continued in force by virtue of section 60. But the legislature by section 19 of the Act of 1898 undertook to fix the penalties for such refusal to list, and that section omits the misdemeanor clause. The subject matter of the assessment of property was revised by the Act of 1898, the provision as to the filing of a schedule was revised and the misdemeanor clause omitted. This, as was held in People v. Thornton and in People v. Freeman, supra, evidenced a legislative intention to substitute the provisions of the new law for the old upon the subject.

"The words of section 60 of the Act of 1898 do not mean that every section of the general revenue law in force prior to the taking effect of the Act of 1898 shall remain in force unless the Act expressly provides otherwise, but also means that wherever in the Act of 1898 the legislature has made provision concerning the subject matter of the Act of 1872, the latter Act shall fall. Such action on the part of the legislature evinces an intention that the old law for which the new is substituted shall not remain in force quite as clearly as could an express provision by the legislature that the old law should not remain in force.

"The provision in the Act of 1898 that if any person shall refuse to make and swear to the schedule required by the Act, the assessor shall list his property and add to the valuation of such list an amount equal to fifty per cent of such valuation, clearly provides a penalty for such refusal. Ponticello Seminary v. Board of Review, 249 Ill. 481; People v. Beacham, 241 id. 415.

"When there are two statutes imposing a penalty and the penalty imposed by one is not the same as that imposed by the other, the later statute repeals the earlier. Gorman v. Raymond, 28 Ga. 55.

"It was clearly the intention of the legislature to do away with the provision of the Act of 1872, making the failure to file a schedule a misdemeanor, and to leave as the sole penalty therefor the addition of a fifty per cent valuation, as provided in Section 19 of the Act of 1898.

"We think that Section 24 of the Act of 1872 is repealed by the Act of 1898, and that the defendant in failing to file schedule of its property in 1914 was not guilty of a misdemeanor.

"If upon any ground it could be held that the Act of 1872 was in force in 1914, the evidence, in our opinion, is not sufficient to sustain the conviction. Inasmuch, however, as in our opinion Section 24 of the Act of 1872 is not to be extended to cover violations of the Act of 1898, and the judgment must therefore be reversed without remanding the case, we do not deem it material to point out in what particular the evidence is insufficient to sustain the judgment."

We see no reason to change the views expressed in the opinion quoted, and the judgment of the Circuit Court is affirmed.

AFFIRMED.

526 - 21924

HENRY J. WEER,
Appellee,

vs.

RAUD A. STRODE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

195 I.A. 309

MR. PRESIDING JUSTICE GRONLEY DELIVERED THE OPINION OF THE COURT.

In a forcible detainer suit, in which Henry J. Weer was plaintiff and Raud A. Strode, William Strode and A. J. Hastings were defendants, judgment for the possession of the premises in question and for costs was rendered by the Circuit Court of Cook County, April 4, 1915, in favor of the plaintiff and against the defendants. An appeal was prayed to this court by all three of the defendants, which appeal was allowed by the Circuit Court upon said defendants filing their appeal bond in the sum of $[illegible] within twenty days from said date, to be approved by the clerk of said court. Within said twenty days an appeal bond was filed in the office of the clerk of said court signed by Raud Strode, one of the defendants, and a surety, but not signed by the other two defendants. The bond appears to have been approved by the judge who tried the case and also by the clerk of the Circuit Court.

Henry J. Weer, appellee, has here filed a motion that the appeal be dismissed. Under the authority of several decisions of our Supreme Court the motion must be allowed. (Wilcox v. Beale, 115 Ill. 355; Tedrick v. Ellis, 1[illegible] Ill. 214; Dixon v. Hammond, 189 Ill. 470, 471; Fortune v. Gilbert, 307 Ill. 335, 337; First Congregational Church v. Page, [illegible] Ill. 157, 163.) The appeal will be dismissed at appellant's costs.

[illegible] DISMISSED.

631 - 22029

NATIONAL BANK OF COMMERCE,
a corporation,
Appellee,

vs.

NORMAN W. CHURCH,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

95 I.A 310

MR. PRESIDING JUSTICE GREMLEY
DELIVERED THE OPINION OF THE COURT.

The transcript of the record in this cause was filed with the clerk of this court on October 6, 1915. Appellee, on October 18, 1915, entered its special appearance in this court for the sole purpose of moving that the appeal be dismissed on the ground that no appeal bond was filed by appellant within the time allowed therefor by the Municipal Court. It appears from the transcript before us that on June 17, 1915, a judgment for $10,817.33 was entered in the Municipal Court in favor of appellee and against appellant, and that on the same day appellant prayed an appeal to this court, which appeal was allowed on condition that he cause file an appeal bond, conditioned according to law, in the Municipal Court in the sum of $15,[illegible], with sureties to be approved by a Judge of the Municipal Court within twenty days from said date. It further appears from said transcript that on July 15, 1915, eight days after the time limited for filing said bond had expired, appellant filed his appeal bond in said sum with the clerk of said Municipal Court, which bond was marked approved by a Judge of said court. It does not appear that any other order was ever ent

by the Municipal Court relative to the time of filing the appeal bond. Under such a state of facts appearing in the record the motion of appellee must be allowed and the appeal dismissed at appellant's costs for reasons stated in the following decisions: Wormley v. Wormley, 96 Ill. 199; Pardridge v. Bergenthau, 157 Ill. 280; Ellis v. City of Chicago, 218 Ill. 178, 179; Ettelson v. Jacobs, 40 Ill. App. 427, 428; Phoenix Ins. Co. v. Hedrick, 69 Ill. App. 184, 185.

APPEAL DISMISSED.

48} - 20822

J. F. CONWAY CONTRACTING COMPANY, a corporation, Appellant,	
vs.	AT A TERM OF THE SUPREME COURT,
CITY OF CHICAGO et al., Appellees.	

MR. PRESIDENT JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

This appeal brings before us an order dismissing for want of equity a bill filed to determine a question of liability for the cost of repairing the roadway of Lincoln avenue which had been paved by complainant under a contract with the city.

Assuming it is to be cognizable properly in a chancery proceeding, about which we have serious doubts, we find that the bill alleges the passage of an ordinance for the improvement of the roadway of Lincoln avenue by paving, the cost to be defrayed by special assessment which was duly levied and confirmed; that complainant was the lowest bidder and on May 20, 1907, entered into the contract in question with the city; that by the specifications the materials to be furnished and the workmanship employed in the construction of the improvement were to be such as to insure the same to be free from defects and in continuous good order and condition satisfactory to the board of local improvements for a period of five years. The bill alleges that complainant constructed the pavement in strict accordance with the ordinance and specifications and that it was approved by the board of local improvements; that the city reserved five per cent. of the contract price as security for the performance by the complainant of its obligation to guarantee the character and stability of the pavement, and that

years. The bill further alleges that shortly before the construction of the improvement the street car companies operating in Lincoln avenue reconstructed the street car tracks as provided in an ordinance passed in February, 1907; that after the tracks were reconstructed and the roadway of Lincoln Avenue paved by complainant under its contract, the weight of cars operating in Lincoln Avenue was substantially increased, and that thereafter depressions gradually appeared in the pavement laid by complainant. The bill avers that the deterioration in the pavement constructed by complainant was caused by the insufficiency of the street railway tracks to support the heavier cars; that the weight of the cars set in motion vibrations of the rails, which operated as a pump, forcing the water out of the sand cushion upon which the wooden block pavement rested, and with it particles of sand from underneath, eliminating the sand cushion to such an extend that the wooden blocks became depressed and the pavement uneven.

The bill charges that the city called upon complainant to repair the pavement, and threatened that if complainant refused it would cause the repairs to be made and apply in payment the amount retained out of the contract price. Complainant prayed by its bill that the city might be prevented from so doing, and asked that the court declare and define the nature of the repairs which under its contract legally devolved upon the complainant to make.

The city filed an answer denying among other things that the improvement was properly constructed, and claiming that the defects in the pavement were caused by faulty construction, and denying that complainant was entitled to relief.

Testimony was taken, and thereupon the chancellor, finding that there was no equity in the bill, ordered that it be dismissed. A decree was entered reciting at length facts which

the chancellor found proven by the evidence, and his conclusions thereon. As a matter of proper practice, there is no reason for reciting facts with conclusions in an order dismissing a bill for want of equity. The findings and reasons of the court are not before us for review.

We hold that the order dismissing the bill was properly entered and should be affirmed. For the purposes of our decision we may assume that the evidence sustains the allegations of fact in the bill; that the materials and workmanship, as such, were free from defects; but we construe the warranty of complainant not only as a guarantee of the quality of materials and workmanship, but that the improvement into which they went would be in good condition for a period of five years. Our construction is based upon the entire contract with special reference to its provisions as follows:

> "The material to be furnished and used and the workmanship employed in the construction of the said improvement shall be of such character and quality as to insure the same to be free from all defects, and shall be in continuous good order and condition satisfactory to the board of local improvements, for a period ending five (5) years . . ."
>
> "As a guarantee of the faithful performance of these specifications, the quality of the material furnished and the proper construction of said improvement, the contractor hereby agrees to keep and maintain said improvement, without additional charge or cost to the city of Chicago, in such order and condition as will be satisfactory . . . Such keeping and maintaining shall include repairs or the entire reconstruction of the same."
>
> "In order to enforce the faithful performance of the terms and conditions of said above agreement on the part of the contractor to keep, maintain and repair said improvement, the city of Chicago, through the board of local improvements, may, upon the completion of said work, retain five (5) per cent. of the cost of said local work."

Similar provisions are elsewhere in the contract, indicating clearly an undertaking by contractor to repair, keep and maintain said improvement in good order and condition.

There is not in evidence such a guarantee. A guarantee of the durability of an improvement constructed by

the guarantor has reference not only to the materials and work, but includes the finished product with reference to any reasonable and probable use. There is no fraud or concealment here. At the date of the contract the heaviest cars running on Lincoln Avenue weighed about 39,500 pounds loaded, but on other street railway lines in Chicago cars were running at this time weighing approximately 57,300 and 70,000 pounds loaded. It is a fair inference that this was known to all the parties. It seems to have been the judgment of those best qualified to know, that the scheme of the improvement would be adequate for use by the heavier cars, although later experience tended to show that this judgment was erroneous; but complainant was entitled to its judgment on the matter and properly might back its judgment with its guaranty. To tie the city to the use of the lighter cars on Lincoln avenue in order to hold the guarantor is to inject an unreasonable condition into the contract.

Supporting our view of the liability upon complainant under the contract are the decisions in City of Lake View v. MacRitchie, 184 Ill. 203; Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582; City of Akron v. Barber Asphalt Paving Co., 171 Fed. Rep. 29. In this last cited case the identical question before us was under consideration, and the court in its opinion said:

> "In regard to * * the introduction of heavier cars upon the tracks, they must, we think, as a matter of law, be treated as having been within the contemplation of the paving company when signing the contract. The tracks were in the street and cars were being operated over them, and no provision was made respecting either dimensions or weight. Nothing violative of any statute is claimed in regard * to * * the size and weight of the cars. Those matters were plainly sanctioned by the law, and they involved only such street uses as every one dealing with streets must anticipate."

Is this a contract to maintain a local improvement by special assessment? We hold that it is not, and in this conclu-

sion we are supported by the decision in Cole v. People, 161 Ill. 16.

The decree of the Circuit Court dismissing the bill for want of equity is affirmed.

AFFIRMED.

6[illegible] - 20946

COLE MOTOR COMPANY, a corporation,
Appellee,

vs.

CENTAUR MOTOR COMPANY OF ILLINOIS, a corporation,
Appellant.

} APPEAL FROM COUNTY COURT, COOK COUNTY.

195 I.A. 317

MR. PRESIDING JUSTICE McGOORTY DELIVERED THE OPINION OF THE COURT.

In a suit in trover for the alleged conversion of an automobile plaintiff had judgment, from which defendant appeals.

Plaintiff sold to F. C. Rieger an automobile, taking a chattel mortgage thereon for $3[illegible] the balance of the purchase price, which mortgage was duly recorded in the recorder's office of Cook County. Subsequently Rieger traded this automobile for another car, the trade being negotiated with C. W. Arnum, an employee of the defendant. The crucial question in issue was whether or not Arnum in making this trade acted for himself individually or as the agent of defendant.

At the request of plaintiff the court gave instructions numbered 4, 5 and 6, touching the burden of proof as to the agency of Arnum in this transaction, and in most explicit language in various forms the jury was told that the burden of proof was on the defendant to show by a preponderance of the evidence that Arnum was not acting for it in making this trade. Such instructions did not correctly state the law. While the duty of producing evidence to meet other evidence may pass from party to party during the progress of a trial, the obligation to establish the truth of

plaintiff's claim by the preponderance of evidence never shifts from the plaintiff. Chicago Union Traction Co. v. Lee, 218 Ill., 9, 15, holds that the burden of proof "rests throughout upon the party asserting the affirmative of the issue, and, unless he meets this obligation upon the whole case, he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end." See, also, Supreme Tent K. O. T. M. v. Stensland, 206 Ill. 124, and Ingbers v. Ingbers, 177 Ill. 82. The giving of these instructions was manifestly erroneous and cause for reversal.

The measure of damages was the value of the car at the time of the alleged conversion, but no proof of its value at this time was offered.

At the time the car in question was traded, anyone taking the car had constructive notice of plaintiff's chattel mortgage, in which among other things it was provided that if the mortgagor should sell or assign said car all of the notes, both principal and interest, secured by said mortgage should, at the option of plaintiff, "without notice of said option to anyone, become at once due and payable," and plaintiff would have the right to take immediate possession of the property. Plaintiff chose to exercise this option, and the party taking the car from Kieger was not entitled to notice.

On the same day that Kieger traded the car either to Arnum or the defendant it was sold to another party. Hence it is unimportant whether the conversion took place when the trade was made by Kieger or when the car was sold to this third party.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

616 - 20954

ROBERT W. SCHULT, Appellee, vs. STATE BANK OF MONTICELLO, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. 20949, in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20949 is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

625 - 20963

ROBERT W. SCHULP, Appellee,	)	
vs.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
STATE BANK OF MONTICELLO, Appellant.	)	

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. 20949, in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20949 is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

654 - 20992

ROBERT W. ROHEFF,
Appellee,

vs.

STATE BANK OF MONTICELLO,
Appellant.

) APPEAL FROM PIATT COUNTY,
) COOK COUNTY.

MR. PRESIDING JUSTICE McCORMLY
DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. 20949, in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20949 is applicable to this case.

The judgment is reversed and the cause remanded.

McCORMLY AND MORAN.

655 - 20993

MISSOURI STATE LINE INSURANCE CO.,
Appellee,

vs.

STATE BANK OF MONTICELLO,
Appellant.

APPEAL FROM SCOTLAND COUNTY, [illegible].

195 I.A. 324

MR. PRESIDING JUSTICE [illegible]

DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. [illegible], in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. [illegible] is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

657 - 20995

MISSOURI STATE LIFE INSURANCE CO., Appellee,	
vs.	AT AL [illegible] APPEAL FROM
STATE BANK OF MONTICELLO, Appellant.	ADAIR, [illegible] COUNTY.

195 IA. 325

MR. PRESIDING JUSTICE ASHMANN

DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Earth v. Farmers & Traders Bank, No. [illegible], in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. [illegible] is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

659 - 20997

MISSOURI STATE LIFE INSURANCE CO. BANK, Appellee,	)
vs.	) APPEAL FROM JACKSON) COURT, [illegible] COUNTY.
STATE BANK OF MONTICELLO, Appellant.	)

195 L.A. 326

MR. PRESIDING JUSTICE ACKERLY

DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. 20949, in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20949 is applicable to this case.

The judgment is reversed and the cause remanded.

R. Vincent Ackerly, Ab[illegible].

661 - 20999

MISSOURI STATE LIFE INSURANCE CO.,
Appellee,

vs.

STATE BANK OF MONTICELLO,
Appellant.

APPEAL FROM MONTICELLO
COURT, [illegible] COUNTY.

195 IA. 327

MR. PRESIDING JUSTICE SCHOLLER
DELIVERED THE OPINION OF THE COURT.

The above entitled case, wit. the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. 20940, in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20940 is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

656 - 20994

MISSOURI STATE LIFE INSURANCE CO.,
Appellee,

vs.

THE CENTRAL BANK,
Appellant.

[illegible] COURT, [illegible].

1951.A.328

MR. PRESIDING JUSTICE [illegible]

DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, [illegible], in which we have this day filed an opinion.

The processing held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20994 is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

658 - 20996

EMIL A. DAVANT,
Appellee,

vs.

THE CENTRAL BANK,
Appellant.

IN AN EAST BATON ROUGE COURT,

[illegible].

195 La. 828

MR. PRESIDING JUSTICE McCALEB

DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. 20949, in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20949 is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

660 - 20998

CHARLES A. TREADWELL, Appellee,	)	APPEAL FROM DELPHIC CIR. CT.,
vs.	)	COOK COUNTY.
THE CENTRAL BANK, Appellant.	)	

195 I.A. 329

MR. PRESIDING JUSTICE SCHAEFER

DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Marsh v. Farmers & Traders Bank, No. [illegible], in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. [illegible] is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

662 - 21000

WILLIAM H. LONG,
Appellee,

vs.

THE CENTRAL BANK,
Appellant.

APPEAL FROM THE HIGH COURT,

CERRO GORDO COUNTY.

195 IA. 330

MR. PRESIDING JUSTICE SCHOLTZ

DELIVERED THE OPINION OF THE COURT.

The above entitled case, with the exception of differences of parties, amounts and certain unimportant particulars, involves similar facts and the same questions as are presented in Barth v. Farmers & Traders Bank, No. 20949, in which we have this day filed an opinion.

The proceeding held to be reversible error in that case occurred also in this case; the reason for reversing and remanding stated in the opinion in No. 20949 is applicable to this case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

86 - 21056

JAMES F. QUIRK, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT OF CHICAGO.
JOSEPH S. McDONNELL, Plaintiff in Error.	

195 I.A. 331

MR. PRESIDING JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for the recovery of money paid by him to defendant upon the execution of an agreement for a warranty deed, alleging default by defendant in his agreement. Trial was had by the court, and judgment for $300 entered against defendant. The agreement is as follows:

"Articles of agreement for Warranty Deed, Form 51, Chicago Legal News. Articles of agreement, made this twenty-fifth day of March in the year of our Lord one thousand nine hundred and fourteen (1914) between J. McDonnell, party of the first part, and James F. Quirk, party of the second part, witnesseth:

That if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances whatever by a good and sufficient warranty deed, the lot, piece or parcel of ground situated in the County of Cook and State of Illinois, known and described as Lot 10 in Block 6 in Telman & Tondelius Subdn. of Lot 5, otherwise known as number 2942 S. Artesian Avenue, and the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of Fourteen Hundred and 00/100 Dollars in the manner following: Three Hundred Dollars on the signing of this agreement and assume a One Hundred to Seven Hundred Dollar mortgage or trust deed to be secured against the property due in about three to five years and the balance of the purchase price at not less than fifteen dollars per month, payable monthly in advance on the fifteenth day of each month at the office of J. McDonnell, Chicago, Illinois, with interest at the rate of six (6%) per centum per annum, payable semi-annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, fire insurance assessments or impositions that may be legally levied or imposed upon said land, subsequent to the year 1913. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on his part hereby made and entered into, this contract shall at the option

of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises aforesaid.

In consideration of the premises herein mentioned the said J. McDonnell agrees to make the following repairs: Straighten and side the basement build two new stairways, one in front and one in rear, fix water pipe in basement, build 24-foot cement walk from lot line in front to rear steps.

It is mutually agreed, by and between the parties hereto, that the time of payment shall be the essence of this contract and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

J. McDONNELL, (Seal)
JAS. F. QUIRK. (Seal)

The whole amount plaintiff agreed to pay for the property was $1400, but he would not be entitled to a warranty deed until he had first made certain payments and done certain things, as follows: (1) the payment of $300 cash, which was paid; (2) the assumption of a mortgage for an amount between $100 and $700 dollars, the exact amount evidently to be determined later; and (3) the payment to defendant of the difference between $300 plus the amount of this mortgage, and $1400, the purchase price, in monthly installments of $15 each, with interest; plaintiff also was to pay taxes, fire insurance premiums and assessments. The result of this would be that if the mortgage assumed by plaintiff should be for $700, this amount plus $300, deducted from $1400 would leave $[illegible], which paid at the rate of $15 a month would take two years and nearly three months. If the mortgage should be for a smaller amount the balance to be paid in monthly installments would be larger, and hence a still longer time would pass before this balance would be paid. In any event, according to the contract plaintiff would not be entitled to a deed until he had completed

these monthly payments. This would take two years or longer.

This view of the contract makes irrelevant any discussion of testimony touching the reasonableness or otherwise of the time taken by defendant to perfect his title. Defendant would not be called upon to give title until the expiration of at least two years.

It is evident, however, that the contract contemplates that plaintiff should have possession before the time arrived when he would be entitled to a deed. This appears from the agreement of defendant to make repairs, and the agreement of plaintiff to pay taxes, assessments, fire insurance, and also the covenant in the agreement that should plaintiff default the defendant should "have the right to re-enter and take possession of the premises."

The time when defendant should give possession not being definitely expressed, the law implies that it will be in a reasonable time (Hamilton v. Scully, 118 Ill. 192); and we see no reason why the parties may not agree verbally as to what is a reasonable time. Parol testimony as to such an agreement does not tend to change or alter the written instrument. It was testified by plaintiff, and not seriously disputed, that defendant agreed to give possession of the premises by April 15, 1914, and the correspondence of the parties tends to prove such an agreement. The contract is dated March 25th, and as late as May 18th plaintiff had not been given possession. While we hold that the parol agreement as to possession was valid, yet the trial court would have been justified in finding, in the absence of any explanation that such a delay in giving possession was unreasonable. Defendant presented to plaintiff and to the court the fact of delay in perfecting his title as an explanation of his delay in giving possession, but as we have indicated his time for perfecting his title was not the same as the time when he was

to give possession. In the matter of possession he was bound to perform in a reasonable time; in the matter of title he had over two years within which to perform.

The judgment of the court was correct and it is affirmed.

119 - 21093

CITY OF CHICAGO,
Defendant in error,

vs.

JANE DOE, alias
Mrs. Mary Metz,
Plaintiff in error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McCURDY
DELIVERED THE OPINION OF THE COURT.

Upon trial by a jury the defendant, Mary Metz, was found guilty of the charge of being the keeper of a disorderly house, in violation of section 2019 of the Chicago Code.

There is little if any controversy as to the character of the premises in question; it clearly comes within the language of the ordinance.

The controverted point was as to whether the defendant, Mary Metz, was its keeper, and the solution of this question depended upon whether the jury believed her story or the testimony of the witness Virginia Gordon. Defendant claimed that she had sold the place to the girl called Virginia Gordon, who was one of the inmates, but Virginia Gordon denied this and gave evidence from which the jury was amply justified in believing that Mrs. Metz was the keeper of the house.

Defendant seems to have had a fair trial, and we find nothing in the conduct of the trial judge which was calculated to prejudice the jury against her. We see no reason to disturb the verdict, and the judgment is affirmed.

AFFIRMED.

21125

152 - 21128

M. C. CONLON, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT OF CHICAGO.
FRANK TESHNOVSKY, Plaintiff in Error.	

195 I.A. 335

MR. PRESIDING JUSTICE McGURLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to have reversed a judgment against him for $247.25 in an action of tort to recover damages alleged to have been sustained through the negligence of defendant in driving his automobile into plaintiff's electric car.

The evidence tended to show that about mid-day the electric car was going east on Winona Avenue in Chicago, moving slowly near the south curb. As it neared the westerly cross-walk of Broadway Avenue, an intersecting north and south street, defendant came southwardly on Broadway driving his 40 horse power gas auto weighing 5,000 pounds, at a rate of speed estimated by some of the witnesses of from 25 to 30 miles an hour. Defendant turned westwardly on Winona Avenue, taking the turn at about 15 miles an hour, and veered towards the south curb and struck the electric car on the side, wrecking it.

It is claimed that the accident was unavoidable because the defendant in making the turn was attempting to avoid striking two girls who were on the cross-walk; but we think the court was amply justified in believing that defendant attempted to turn at so high a rate of speed as to cause his car to swing over onto the south side of Winona Avenue into

the electric car, and that in so doing defendant was negligent.

Is the amount allowed for damages too large? Witnesses testified as to the damages and the necessary repairs and the usual and customary charges therefor. The principal items controverted are a tire and the cost of painting. It was fairly proven that a new tire was necessary, and the amount paid therefor was the usual and customary charge. There was testimony that the electric car was six months old at the time of the accident and that the paint was then "bright and lustrous." Its entire side was struck, scratching the paint off the wheels, fenders and body. We have considered the opposing testimony and the argument of counsel, but cannot conclude that the amount of damages found by the trial court was not fairly justified from the evidence.

There appearing no reason for reversing the judgment it is affirmed.

AFFIRMED.

18 - 20488

PETE MRAMIS et al., Defendants in Error, vs. JAMES H. HOOPER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 342

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment for $100, balance claimed by plaintiffs from defendant Hooper on a verbal agreement to put a sewer, catch basin and water closet in a building of defendant for $110, and for $40 for extra work not included in the agreement, on which defendant had paid $50.

The contention of plaintiff in error is that the soil pipe was not placed in the proper place and that no extra work was done by plaintiffs. There was no agreement or order of the defendant as to where the soil pipe was to be placed. The testimony is conflicting, and we think the Court might properly find from the evidence that there was $100 due from defendant to plaintiffs, and the judgment is affirmed.

AFFIRMED.

49 - 20826

THOMAS McGIVERN,
Defendant in Error,

vs.

ELIZABETH PARKHILL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 343

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment for the plaintiff, McGivern, against the defendant, Elizabeth Parkhill, in forcible detainer entered on a directed verdict for the plaintiff. The question presented is: did the court err in directing a verdict for the plaintiff? In deciding this question the evidence most favorable to the defendant is to be taken as true and inferences drawn from such evidence most favorable to the defendant that can be fairly drawn therefrom.

* Defendant was in possession of the premises in question under a written lease executed by plaintiff and by her, for one year ending April 30, 1914. She testified that in March or April of that year defendant asked her if she wanted to stay another year, and she said yes, she wanted a lease for three years; that plaintiff said that he did not want to make a lease for more than one year, but then said, "I will give you a two years lease," and that she said "All right"; that defendant delivered to her May 1st duplicate instruments in writing in the form of leases of the premises for two years, in the body of which plaintiff is named as lessor and defendant and her husband, E. J. Parkhill, as lessees, which instruments had not been signed by any one; that she and her husband signed said instruments about a week after May 1st; that she kept said instruments in her

possession and did not tell plaintiff that she or her husband had signed the same until July 28, when plaintiff served her with a notice in writing that he had elected to terminate her lease of the premises, her lease and tenancy to terminate August 31, and notifying her to surrender possession of the premises to him at the close of that day; that she then said to plaintiff, "You can have your leases; they have been signed." She gave as a reason for not informing plaintiff that the instruments were signed and returning the same to him, that she was waiting to see what he would do about dividing the store, and admitted that the dividing of the store and the leasing to her of one half of it, was discussed between her and plaintiff after May 1. Such conversation tends to show that defendant did not consider the instruments delivered by plaintiff to her as a lease of the premises for two years.

When a lease contains mutual covenants and is executed by the lessor only and is delivered to and accepted by the lessee, the lessee is bound by its terms; but here the instrument which was delivered to defendant was not executed by the lessor, and the case is not within the rule above stated.

The testimony of defendant clearly shows that she retained possession of the premises in question after April 30 under a verbal promise of plaintiff that she should have a lease for two years. This agreement was void under the Statute of Frauds, and thereby she became a tenant from month to month. Creighton v. Sanders, 83 Ill. 543. The instruments delivered to defendant were not executed by plaintiff and he was not bound by such instruments, and the agreement of lease was not taken out of the statute of frauds thereby. Part performance does not at law take a case out

of the Statute of Frauds. Leavitt v. Stern, 159 Ill. 562; Creighton v. Sanders, supra.

The view most favorable to the defendant that can be taken of the delivery of the unsigned instruments on May 1, is that it amounted to an offer on the part of plaintiff to lease the store for two years. She did not notify plaintiff that she had signed or accepted the lease until July 28, and then only upon plaintiff delivering to her a notice terminating her tenancy, which, in legal effect, amounted to a withdrawal of his offer theretofore made to rent her the premises.

"An offer may be revoked or withdrawn at any time before it is accepted and acceptance communicated to the party, for, until then, there is neither agreement or consideration. 9 Cyc. 284.

An offer once made is not to be regarded as open for the acceptance indefinitely. If no time for acceptance is fixed by the terms of the offer, and acceptance is made within a reasonable time and before revocation, it completes the contract; but delay in acceptance beyond a reasonable time causes the offer to lapse and a subsequent attempt to accept is of no legal effect. No formal withdrawal of the offer is necessary, if it remains unaccepted after a reasonable time." 1 Page on Contracts, ch. 6, sec. 38; Traunstine & Co. v. Sellers, 35 Fla. 447; 9 Cyc. 284.

The signing of the instruments by defendant and retaining the same in her possession was no more than a mental assent. There was no act of acceptance until July 28, but, according to her testimony, she informed defendant that the instruments had been signed, and this was not within a reasonable time. When the offer was not accepted within a reasonable time, plaintiff was at liberty to regard the offer as rejected and to make other disposition of his property.

Plaintiff in error also contends that the judgment should be reversed because W. J. Carmill was not joined as a defendant; but this contention cannot be sustained. The verbal agreement was between plaintiff and defendant alone. There is no evidence that W. J. Carmill was in possession,

and he was not a necessary or proper party to the suit.

We think that on the evidence in the record, the Court did not err in directing a verdict for the plaintiff, and the judgment is affirmed.

AFFIRMED.

636 - 20974

CLARENCE D. ROON et al., Appellees,	
vs.	APPEAL FROM 2nd HIGH COURT OF COOK COUNTY.
KINZER CONSTRUCTION COMPANY, a corporation, Appellant.	

1951 A. 047

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Kinzer Construction Company, defendant, to reverse a judgment recovered against it by appellees, the surviving partners of the late firm of Roon & Hale, for $7646.87. February 1, 1926, the Kinzer Company entered into a contract with the Chicago Southern Railway Company to build certain parts of its railroad between Chicago Heights and the Indiana State line. February 14 the Kinzer Company entered into a contract in writing with the firm of T. L. Hill Company to do the concrete work between the points above mentioned. April 18 the Hill Company entered into a contract in writing with Roon & Hale to haul the materials to be used by the Hill Company in the performance of their contract with the Kinzer Company. Roon & Hale began work April 22. Their contract provided that they should be paid 85 per cent of all work done up to the 15th of each month on the 30th of the month, and the remaining 15 per cent on the completion of the work. There is no mention of estimates in the contract, but the Hill Company gave Roon & Hale estimates; the first for the work done to June 1, and the second for the work from June 1 to July 1; the third for the work done from July 1 to August 1; the fourth for the work done from August 1 to September 1, 1926.

The right of action of Loon & Hale against the Kinzer Company is based on an alleged verbal contract between Loon & Hale and the Kinzer Company, made during the first week of June, 1905, whereby the Kinzer Company agreed to pay Loon & Hale for the work they had contracted with the Hill Company to do. It is based on the testimony of plaintiff Hale, who testified that in the first week in June he and his partner, Loon, went to a place where a bridge was to be built over the Kankakee River and there accidentally met Thomas J. Kinzer, the president of the Kinzer Company, and that Kinzer asked who they were. Loon died before the trial. Hale testified to the conversation, and Kinzer testified that no such conversation occurred; that he did not meet Loon and Hale at the time or place testified to by Hale. Hale testified that he said to Kinzer that plaintiffs had received no money and no estimate on the work since they started, and were dissatisfied and were going to throw up the work; that Kinzer asked them not to do that; said if they threw up the work it would delay it, "and for us to go along and do the work the same as we had been and he would pay us."

The first contention of appellant is that no such verbal contract between plaintiffs and defendant as plaintiffs alleged was made, was ever in fact made. This contention, if sustained, is fatal to plaintiffs' right of action, for their right of action against defendant is based on such alleged verbal contract. As to the conversation in which such contract is alleged to have been made, the only witnesses were Hale and T. W. Kinzer, the president of defendant Company, and their testimony, as has been said, is in direct conflict. We do not regard the testimony of Clapper as of any considerable value as corroborative of the testimony of Hale. It was that he met Kinzer on the road soon after June 1st, and Kinzer said, "There

would be no reason for us hanging back or taking our teams off from the work; that he had "resumed the responsibility now, and we could go ahead with our contract with confidence." There is no pretense that the Kinzer Company was responsible to Moon & Hale, before the making of the alleged verbal contract, and there was as to them no responsibility for the Kinzer Company to resume.

To sustain their cause of action, plaintiffs were bound to prove that defendant made a direct promise to plaintiffs to pay them for hauling the material they had contracted with the Hill Company to haul at the price agreed on between plaintiffs and the Hill Company. In determining whether such a promise was made, we must look not only to the testimony as to verbal statements, but to the facts and circumstances surrounding the parties at the time and their subsequent acts and conduct. The Kinzer Company had a valid written contract with the Hill Company to do their hauling and had no knowledge or information as to the terms of the contract between the Hill Company and plaintiff. Under such circumstances, it seems improbable that Kinzer for the defendant would make an agreement with plaintiff that they should do the work the Kinzer Company had contracted with the Hill Company to do, without the knowledge and consent of the Hill Company, and agree to pay them the amount which would be due them under their contract with the Hill Company.

The subsequent acts and conduct of plaintiffs are inconsistent with their claim that the defendant promised during the first week in June to pay them for the hauling they had contracted with the Hill Company to do. In place of reporting to the defendant company the amount of work they had done and getting their pay from that Company, they obtained estimates from the Hill Company and orders of the Hill Company

on defendant for the amount shown to be due on such estimates, and took the orders on estimates to the defendant, and were given checks for the amount of such orders. The contract between the defendant and the Railway Company provided that estimates should be made by the Railway Company each month for the work done during the preceding month, which should be paid on or before the 15th of each month. The contract between the Linzer Company and the Hill Company provided that each month estimates should be made by the Linzer Company's engineer of the work done during the preceding month, which should be payable on or before the 15th of the month. Plaintiffs obtained estimates from the Hill Company, made in accordance with their contract with the Linzer Company, and presented them for payment at the time fixed by the contract between the Linzer Company and the Hill Company.

June 19, 1905, three weeks after the alleged contract between Coon & Hale and the Linzer Company, Hale went to the office of the Hill Company to get his estimate. It was given to him and with it an order on the Linzer Company, signed by the Hill Company, for the amount due Coon & Hale from the Hill Company, $1234.47, as shown by the estimate. The order directed that the payment be made and charged to the T. H. Hill Company account, which was done. The office of the Hill Company and that of the Linzer Company were in the same building, and Hill took Hale to the office of the Linzer Company and introduced him to Thomas [illegible] Linzer, the president of the Linzer Company, as he testified, for the purpose of identifying Hale so that he could get his order paid. Hale admits that he was then introduced to Linzer. The estimates for June and July were collected by Coon & Hale in the same manner; for each they received an order on the Hill Company

on the Kinzer Company for the amount shown to be due by the estimate, and presented the same with the estimate to the Kinzer Company and for it received a check of the Kinzer Company. In September the Hill Company was in financial trouble and the voucher for August, which should have been paid September 15th, was unpaid, and that day a receiver was appointed for the Hill Company. Hale testified that the contract of the Hill Company with Koon & Hale was not cancelled, and there is no evidence tending to show that it was cancelled or abrogated.

Other evidence in the record tends strongly to show that the contract of the Hill Company with Koon & Hale remained in force, and that they alone were concerned with the hauling of the material that Koon & Hale had contracted with the Hill Company to haul. June 12, 1903, Koon & Hale by letter advised the Hill Company of the number of cars of material that were required to keep their force busy. June 27, Koon & Hale again wrote the Hill Company about the progress of the work. July 25, Koon & Hale sent the Hill Company a check for car service and asked the Hill Company to see if the amount could not be rebated to them. August 14, by another letter, Koon & Hale advised the Hill Company of the progress of the work and asked them for a full supply of material and requested July estimate early so they could settle with some of the contractors who were completing their work. September 12, Koon & Hale wrote the Hill Company that they would return a grading plow and asked the Hill Company not to make a deduction from their estimate for the plow.

Koon & Hale made a contract with one Wilser to do a part of the work they had agreed to do by their contract with the Hill Company. Wilser brought his suit against Koon & Hale in Lake County, Indiana, to recover the amount due

him from Koon & Hale for work done under his contract, and by change of venue the case went to Michigan City for trial. It was there tried in December, 1905. In that case both Hale and Clapper testified that the hauling done by Koon & Hale was done under their contract with the Hill Company, and neither of them mentioned or referred to the Linzer Company or to any contract with that Company. Hale further testified in that case that Koon & Hale received estimates of the amount of material hauled each month; that these estimates covered their entire contract with the Hill Company "from one end to the other"; that he told Wilder that he was getting up a final claim, so that he could file it at Momence or Kankakee and protect their rights against the Railway Company. Koon & Hale filed a claim of lien against the Railway Company in Kankakee County October 5, 1905, and the attorney who filed the claim testified that he had a conversation with Koon of Koon & Hale with reference to filing the claim.

Plaintiffs also made a claim of the amount due them for hauling against the receiver of the Hill Company and also in a bankruptcy court against the Hill Company, and from their acts and conduct it clearly appears that their business dealings were with the Hill Company only, and that the claim against the Linzer Company was an afterthought; that they regarded the contract of Koon & Hale with the Hill Company as in force, and their claim for hauling done as a claim against the Hill Company, and it was not until they had failed to collect from the Hill Company that they made a claim against the Linzer Company. That claim was made in this suit, which was brought June 2, 1908.

Our conclusion from a careful examination of the evidence in the record is, that the evidence fails to show a contract between the Linzer Company and Koon & Hale, by which

plaintiffs agreed to pay such a sum for hauling the materials said firm had contracted with the Hill Company to haul, or any promise by the defendant to pay said firm for such hauling, and the judgment will therefore be reversed.

[illegible].

(Over)

636 - 20974 FINDINGS OF FACT.

The Court finds as facts in this case that the record does not show a contract between the defendant Company and the firm of Moon & Hale, of which firm the plaintiffs are the surviving partners, by which defendant promised to pay said firm for hauling the materials which said firm had contracted with the firm of Hill & Company to haul, or any promise by defendant to pay said firm of Moon & Hale for such hauling.

32 - 21652

T. W. SCHULZE, doing business as T. W. Schulze & Company,
Defendant in Error,

vs.

J. S. PARRISH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 348

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted to reverse a judgment for $92.5[illegible] for commissions claimed for negotiating for defendant an exchange of certain real estate for other real estate owned by Laura Jensen. The defendant in error has not seen fit to file a brief.

The affidavit of claim is for "the usual, ordinary and customary brokerage commission," etc. There is no evidence in the record that the commissions charged and recovered are the usual broker's commissions for negotiating an exchange of real estate; but the testimony for the plaintiff was that there was a special agreement as to the rate of commissions to be paid.

The contention of defendant, supported by his testimony at the trial, was that there was an agreement between him and the plaintiff that he should not pay any commissions, but plaintiff would get his commissions from the other party to the exchange. Plaintiff denies that any such agreement was made. The Court stopped the defendant while he was on the witness stand, and announced his finding and judgment for the plaintiff. The defendant objected and stated that four witnesses for defendant had been sworn and would testify that Phillips, who testified that he procured the contract of exchange, states that no commis-

sions were due from defendant. But the court refused to permit the witnesses to testify and refused to permit defendant to continue his testimony, and again announced a finding and judgment for the plaintiff, and defendant excepted.

We think the court erred in such ruling and in giving a judgment for the plaintiff, and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

137 - 21111

CITY OF CHICAGO,
Defendant in Error,

vs.

JOSEPH SMITH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of the Municipal Court assessing a fine of $200 against plaintiff in error Smith for a violation of Section 2412 of the Revised Municipal Code of Chicago. The transcript filed is of the common law record only. That record shows that the defendant appeared, filed a written waiver of a trial by jury, submitted the cause to the Court, and entered into a recognizance to appear for trial; that he did appear and the Court heard the evidence, found the defendant guilty of a violation of the ordinance mentioned in the complaint, and assessed a fine against him of $200.

The defendant having appeared and submitted the cause to the Court, the facts relating to his arrest are immaterial. The question submitted to the Court was whether he was guilty as charged in the complaint. The complaint is not a blanket complaint, as contended by plaintiff in error. It charges only that defendant "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace," and this is a charge of a single offense only.

The record is free from error and the judgment is affirmed.

AFFIRMED.

8½ - 20272

LORD & THOMAS, a corporation,
Appellee,

vs.

DAISY K. HAHN, Executrix of the Will and Estate of Harry K. Hahn, deceased,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

19 Ill. App. 356

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Harry K. Hahn, the defendant in this action, has since the perfecting of this appeal died, and his death being suggested of record, his executrix has been by order of this Court substituted as appellant.

Harry K. Hahn guaranteed a certain contract between Lord & Thomas, a corporation, the appellee here, and the Sanitary Drinking Cup Company. On this contract suit was brought in the Superior Court and a judgment rendered in favor of appellee and against the Sanitary Drinking Cup Company for $1452.48, from which judgment an appeal was prosecuted to this Court, and in that appeal the judgment of the Superior Court was by this Court affirmed. The opinion on that appeal can be found in 151 Ill. App. 156, where all the essential facts touching the validity of the contract guaranteed by Harry K. Hahn and the liability of the Sanitary Drinking Cup Company thereunder sufficiently appear.

The question for our determination in this case is the liability of Hahn, the guarantor of the contract involved in the Lord & Thomas case, supra. The guarantee is in the following words:

"Chicago, Nov. 15, 1911.

Lord & Thomas,

Gentlemen: I guarantee the acct. of the Sanitary Drinking Cup Co. of Ills. to the maximum amount of twenty-five hundred dollars , and it is signed "Harry S. Hahn."

It is not denied that Lord & Thomas declined to enter into the contract with the Drinking Cup Company unless it was guaranteed, and Hahn voluntarily offered to be the guarantor, and being Secretary and Treasurer of the Company he was naturally interested in its success, and the scheme of advertising contemplated by the contract was at the time considered to be a means to bring about that end. It is urged, however, that this is not a guarantee of the contract, but simply of the account of the Cup Company. The only account between Lord & Thomas and the Cup Company, so far as the record shows, is the one arising under the contract between them. It is also said that the guarantee is without any independent consideration moving to Hahn. The consideration for the guarantee was the execution of the contract by Lord & Thomas, as they had refused to execute it without a guarantee. This is a sufficient consideration. The difference in the dates of the contract and the guaranty is of no controlling importance. The contract was executed in faith of the promise by Hahn to guarantee it.

Joslyn v. Collinson, 26 Ill. 62, has no application to the case at bar. The Joslyn case was one of a note made and delivered by the maker to the payee, which made a complete transaction. Subsequently the note was guaranteed without any consideration moving to the guarantor, who was a stranger to the original transaction; while the Cup contract in question was executed in faith of the promise of Hahn to guarantee it. His verbal promise followed by operation of law related back to the date of the contract.

The judgment of the Superior Court being with-

out error, and Harry W. Hahn having died, as above recited, there will be judgment here for $1807.56, the amount of the judgment below, with interest at the rate of 5 per cent per annum from December 22, 1910, the date of the judgment in the trial Court, with costs here and below against Daisy K. Hahn, executrix of the will and estate of Harry W. Hahn, deceased, to be paid in due course of the administration of said estate.

JUDGMENT HERE FOR APPELLEE

FOR $1807.56.

583 - 20920
584 - 20921
585 - 20922
586 - 20923

ISAIAH R. CLARK et al., Appellees,	)	
vs.	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
ROSALIE A. SELFRIDGE et al., Appellants.	)	

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

These cases present the same questions that are presented in case No. 20924, ante p. and were submitted on the abstracts and briefs filed in that case. For the reasons stated in the opinion in that case the judgments in these cases are reversed, but the causes are not remanded.

REVERSED.

147 - 21123.

UNITED STATES BREWING COMPANY OF CHICAGO, (a corporation), Defendant in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
JOE POCHEK, Plaintiff in Error.	

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer in which plaintiff recovered a judgment for the possession of the premises set forth in the complaint, and defendant sues out this writ of error and seeks a reversal of that judgment.

Defendant was tenant of plaintiff under a written lease which expired by its terms October 31, 1914. Defendant held over after the termination of the lease and disputes the title of his landlord, and sets up title in a third party as his defense. The evidence proffered to support this defense was on motion of plaintiff excluded by the trial judge, who directed a verdict. This action of the court is assigned for error.

The action of forcible detainer is an action involving solely the question of the right to the possession of real estate. It is admitted for defendant that it is well settled as the law of this state that a tenant can neither deny nor attack the title of his landlord. However, it is also contended by defendant that there is an exception to this rule which allows of a tenant showing that the title of his landlord has terminated. This contention while well taken, is not applicable to this case, but only to causes in which property titles may be tried. The cases cited by

defendant in support of his contention are not of the same character as the case at bar.

The rule that a tenant cannot challenge the title of his landlord has been promulgated uniformly by our courts from an early day in the judicial history of our state, commencing with the case of Fortier v. Ballance, 10 Ill. 41 and continuing to the comparatively recent case of Meier v. Hilton, 257 Ill. 174. In the Fortier case supra, the court say:-

> "The principle that a tenant cannot dispute his landlord's title, applies with peculiar force in this case, and it is wholly immaterial in cases of forcible detainer, where the relation of landlord and tenant exists, whether the tenant or he to show the tenant has surrendered the premises, which is the same thing, show title or not. The object of this proceeding is not to try the title to the land, but to enable the landlord to regain the possession of the premises after the termination of the lease, either by forfeiture, as in this case, or by the efflux of time. * * * These cases fully establish the doctrine, that a tenant is not permitted to show in this summary proceeding, that his landlord's title has expired, or that some third person has the right to the possession. He must first surrender up the possession to him from whom he received it before he shall be permitted to say that his landlord has no longer a right to retain it." Merki v. Merki, 212 Ill. 121; Kipley v. Luke, 106 Ibid. 395; Geiger v. Brown, 167 Ill. App. 504.

In Meier v. Hilton, supra, it was held that an action of forcible entry and detainer is a summary statutory proceeding for restoring the possession of land to a person who is wrongfully kept out or has been wrongfully deprived of the possession in the particular cases mentioned in the statute; that such action is possessory only and the question of title cannot be tried.

Personal property is not the subject of an action of forcible entry and detainer. While personal property is sought to be recovered by the complaint on file, that phase of the case was not presented by plaintiff to the trial court, except that such personal property is described in the lease between the parties found in the record. The judgment challenged is for the possession of the premises demised by

the lease and not for the personal property also described in the lease as being in and upon the demised premises. As the judgment which we are asked to reverse is for the possession of the premises alone, the reference in the complaint to personal property may be regarded as surplusage, and we so treat it.

The judgment of the Municipal Court being free from reversible error, is affirmed.

AFFIRMED.

7½ - 20950

ALBERT A. NEWMAN, Appellee, vs. NEWMAN CLOCK COMPANY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

1951 I.A. 372

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in favor of the plaintiff, the appellee, in a suit brought by him to recover installments of salary claimed to be due from defendant, the appellant, under a written contract.

In a prior action brought to recover other installments claimed to have been previously due under the same contract, plaintiff obtained a judgment which, over defendant's objection, was received in evidence in this case on the theory that it was an adjudication of the question of defendant's liability under said contract. But since the rendition of the judgment in the present case, the judgment in the prior case has been reversed by the Supreme Court, (268 Ill. 426), holding as a matter of law that the acts of the plaintiff shown by the record in that case amounted to a breach of his agreement which by the terms of the contract released defendant from liability thereon for said salary.

In view of that decision appellee confesses error in the admission of said prior judgment in evidence, consents to a reversal and asks that the cause be remanded.

But as an inspection of the record before us discloses proof of the same facts upon which the Supreme Court held there could be no recovery on the contract as a

matter of law, thus necessarily precluding recovery in the present case, appellant urges that the judgment must be reversed without remanding, and to that end requests consideration of the error assigned to the overruling of its motion for a directed verdict in its favor. We think appellant rightly insists that the confession of error does not preclude consideration of other errors not confessed. (Sun Ins. Co. vs. White, 5[illegible] Pac. ([illegible]inn.) 546). As there could be no recovery in law on the undisputed facts, the motion for a directed verdict should have been allowed and there should be a final disposition of the case here without regard to the error confessed. The judgment will accordingly be reversed without remanding the cause.

REVERSED.

619 - 22017

PARASKOTIS KISLIATOS and ANDREAS CALIKEAS,
Appellees,

vs.

CONTINENTAL & COMMERCIAL NATIONAL BANK and ANTON J. CERNAK, Bailiff, Municipal Court of Chicago,
Appellants.

ASSUMPSIT FROM MUNICIPAL COURT OF CHICAGO.

195 IA 375

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendants below prayed and were allowed an appeal from a judgment of the Municipal Court of Chicago rendered in a proceeding for the trial of the right of property, which is a case of the fourth class. (Municipal Court Act, sec. 2, subdiv. fourth [d]). Appellee moves (1) to strike from the record the bill of exceptions filed herein and (2) to dismiss the appeal for want of jurisdiction of this court to entertain it.

The judgment was entered and an appeal prayed and allowed July 24, 1915, and the order included a provision allowing sixty days for filing a bill of exceptions. On September 18, 1915, the time was extended thirty days, and pursuant thereto the document in question was filed October 28, 1915.

As it is a fourth class case and the extension of time for filing the document was not allowed within thirty days of the entry of judgment, the motion to strike presents the identical question that was before the Supreme Court in Passers vs. North German Lloyd Steamship Co., 244 Ill. 57 , where it was held that the Municipal Court had no power to make such an order in a fourth class case after thirty days from judgment. (See also Surlitzer v. Dickinson, 247 id. 27). That decision makes it our duty to strike such

document from the record.

As to the other branch of the motion, it is enough to say in the language of our Supreme Court, "The general rule that a right to an appeal is purely statutory has been settled beyond controversy," (Drainage Commissioners, etc. vs. Harms, 238 Ill. 414-418), and where the General Assembly has not provided for any appeal from judgments of the Municipal Court none can properly be allowed. (People vs. Gartenstein, 248 Ill. 546-553). As neither the Municipal Court Act nor any other act gives the right of appeal from judgments of the Municipal Court in cases of the fourth class, (see opinion filed October 8, 1915, Gen. No. 20862, Israelstam vs. United States Casualty Co.), the motion to dismiss the appeal must also be allowed.

APPEAL DISMISSED.

102 - 21492

CITY OF CHICAGO,
Defendant in Error,

vs.

SAMUEL ISAACSON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

195 I.A. 376

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is a motion to strike from the record the document called the bill of exceptions, and to affirm the judgment of the Municipal Court.

The document is simply the recital that on the trial witnesses were sworn and examined in court; neither their names nor anything they said is given. There is then a statement that the plaintiff further introduced in evidence a certain ordinance of the city of Chicago, followed by what seems to be a copy of an ordinance; then a statement that the court pronounced judgment against the defendant, that this was objected to and the entry of the judgment objected to; that a motion was made to vacate the judgment and for a new trial, and a motion in arrest, all of which were ruled upon adversely to defendant. The certificate of the trial judge says that, "the within bill of exceptions contains all the questions of law raised and decided in the above entitled cause."

This document is not a "correct statement * * * of the facts appearing upon the trial and of all questions of law," nor is it "a correct stenographic report of the proceedings at the trial," as prescribed by section 33 of the Municipal Court act, chapter 37 Illinois Statutes. Defendant

concedes this, but says it is "in the form of the common law bill of exceptions," and is sufficient to bring in review "points purely legal in their aspect, irrespective of the evidence."

The right to have a judgment of the Municipal Court reviewed is statutory, and we find nothing in the statute referred to which permits the omission of the evidence, either in a correct statement or the stenographic report. There is language which affirmatively directs the presentation of the evidence to the reviewing court. In the cases cited by defendant the document filed purported to contain all the evidence submitted on the trial. The document before us contains no evidence whatever and cannot be, as contended, "equivalent to a stenographic report." The statute provides that the stenographic report may omit certain proceedings "other than the evidence." This negatives any argument that the evidence may be omitted. For the reasons above indicated the document called the bill of exceptions is stricken from the record herein.

The errors assigned on the record are without merit, and the judgment is affirmed.

AFFIRMED.

103 - 21493

CITY OF CHICAGO,
Defendant in Error,

vs.

SAMUEL ISAACSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURLY
DELIVERED THE OPINION OF THE COURT.

This is a motion to strike from the record the document called the bill of exceptions and to affirm the judgment of the Municipal Court. The facts and reasons therefor in this case are identical with those in No. 21492, in which we have this day entered an order and filed an opinion. For the reasons stated in that opinion the motion to strike will be allowed in this case and the judgment affirmed.

AFFIRMED.

107 - 21081

LEO LUCOWSKI,
Plaintiff in Error,

vs.

MORELAND & CO.,
Defendant in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

195 I.A. 277

MR. PRESIDING JUSTICE McAUSLEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, employed by defendant in a building under construction, while walking across some uncovered floor joists fell, receiving injuries. He brought suit, alleging that a joist on which he stepped had turned, being insecurely fastened, thus causing him to fall. Trial was had, and upon a verdict of not guilty judgment of nil capiat was entered.

Plaintiff says that liability was established by the evidence. At the time of the accident he was 41 years old, with 15 years' experience working on buildings. He had worked on the present building four or five months as a general laborer carrying brick, etc. He testified that he was ordered by the foreman to carry bricks to a bricklayer; that to reach the bricklayer it was necessary to cross on floor joists which were uncovered, and plaintiff said to the foreman that planks should be laid on the joists over which he could walk, but the foreman said this was unnecessary; that as plaintiff stepped on a joist it "wabbled" and he fell, striking his side on the edge of the joist. On the contrary there was sufficient testimony to cause the jury to believe that nothing was said by plaintiff or the foreman about planks; that plaintiff was thoroughly experienced in walking over uncovered joists and that that was the customary thing for workmen to do; that the joist in question was not loose and did not "wabble"; other

workmen had walked on it and noticed nothing wrong with it; that plaintiff fell because he stepped on a mortar board lying on the joists, which tipped. The verdict of the jury was well within a reasonable view of the evidence.

In this court plaintiff for the first time claims a violation of section 1 of the socalled "Structural Act" of 1907, chapter 48 Illinois Statutes. This section covers the construction of scaffolds, hoists, cranes, etc., and has no application to the facts concerning the present accident. The fall of plaintiff had no connection with any of the appliances mentioned in this act.

There is no merit in the criticisms of instructions on the ground that they ignored the "Structural Act"; this act was not in the case.

The judgment is affirmed.

AFFIRMED.

169 - 21146

WILLIAM T. WRIGHT,
Plaintiff in Error,

vs.

JOHN L. [illegible] and [illegible]
JOHN T. ROGERS,
Defendants in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

In an action of replevin for the possession of a dog, the judgment of the trial court was for the defendants, which plaintiff says was not warranted by the evidence.

Consideration of the evidence adduced by plaintiff produces almost a conviction that the dog belongs to him, but the evidence on behalf of the defendants seems to prove almost to a certainty that the dog is theirs. From the record before us it is impossible to establish conclusively the identity of the dog; the evidence is hopelessly conflicting.

In such a situation we must be guided by the better opportunity of the trial court to judge of the credibility of witnesses. Furthermore, the trial court had before it the dog in question, and was helped by observing and examining it to arrive at a conclusion as to its identity. Some of the witnesses attempted to describe its markings and physical characteristics, which the court could verify. Of course the dog is not before us.

We cannot say that the judgment of the trial court was incorrect; therefore it is affirmed.

AFFIRMED.

181 - 21158

JOHANNA HALLER,
Defendant in Error,

vs.

N. N. HOPKINS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

195 I.A. 380

MR. PRESIDING JUSTICE McCARTHY
DELIVERED THE OPINION OF THE COURT.

Defendant, under a distress warrant authorizing him to distrain for rent due from Walter A. Sanoica for premises No. 2013 West North avenue, seized store fixtures which Johanna Haller, plaintiff, claimed belonged to her and not to Sanoica. She brought suit in replevin and had judgment which defendant seeks to have reversed. The property seized consisted of show cases, cash register and desk.

The evidence tended to prove that prior to March 1, 1909, this property belonged to Otto G. Haller and was used in a drug store owned by him. On that date by bill of sale he conveyed this property to plaintiff, his wife, and the bill of sale was duly recorded in the recorder's office of Cook County. Subsequently Otto G. Haller died. On March 30, 1912, plaintiff, who was not a druggist, made an agreement with Sanoica, who was a druggist, to manage the drug store at No. 2013 West North avenue for a period ending March 31, 1913, which agreement was subsequently extended for a period of five years. By this agreement the stock and fixtures were leased to Sanoica for a rental payable in monthly installments. He was also to assume the rent of the store-room No. 2013 West North avenue. The lease of this store-room to Haller (although the exact lessee does not clearly appear) apparently having terminated,

a new lease of No. 2013 was made by Tabor, May et al., trustees, etc., who had recently purchased the property, to Sanoica. This lease was dated September 22, 1913, and was for a period of about six years. Sanoica was unable to keep up his payments to plaintiff under his contract with her, and about September, 1914, by mutual agreement this contract was terminated and the stock and fixtures of the drug store were moved out of No. 2013 and into No. 2011, a store room which she had leased. Sanoica continued working for her. The distress warrant was for rent due from Sanoica for October, 1914, of No. 2013, but defendant seized the property which was in plaintiff's store, No. 2011.

From a consideration of these circumstances we hold that the trial Court was justified in finding that plaintiff had both title and possession of the property at the time of the levy of the distress warrant.

We do not think that either the defendant or the landlord was misled into believing that Sanoica owned the store fixtures. The record of the bill of sale was constructive notice of the ownership. Furthermore, the landlords, through their agent, were informed two days before the levy that plaintiff and not Sanoica owned the store, and at the time of the levy the defendant was specifically so informed. Defendant acted in the face of notice that the property did not belong to Sanoica but did belong to plaintiff, and any prior statements by Sanoica claiming ownership, even if admissible, would neither preclude plaintiff nor excuse defendant.

The taking being wrongful, no demand was necessary.

Both the contract between plaintiff and Sanoica and the bill of sale to plaintiff were competent as evidence, as tending to show plaintiff's title. While the document between plaintiff and and Sanoica may have been a contract

of sale as far as the stock was concerned, yet as to the fixtures it was clearly a contract of leasing.

The trial court was correct in its finding, and the judgment is affirmed.

AFFIRMED.

205 - 21183

CLARA LESNIOWSKA, Defendant in Error, vs. A. M. GODLEWSKI, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 383

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant asks that a judgment of $800 against him be reversed. He brings before us only the statutory record. We cannot know in the absence of a bill of exceptions, statement of facts or stenographic report what were the proceedings in the Municipal Court or what the evidence was.

Defendant says he was entitled to notice before default could be entered against him. Whether or not defendant received notice would not appear in the statutory record. Grundies v. Martin, 90 Ill. 552. We must presume the legality of the proceedings unless it affirmatively appears that the necessary steps were not taken. It does appear in the record that the cause came on "in regular course for trial." No reason appears why defendant could not have appeared in court and properly presented any defense he might have. If anything was omitted to the disadvantage of defendant the burden is on him to make this omission affirmatively shown by the record.

The verdict and judgment are proper in form against the defendant. While several defendants were named in the summons only two were served, but before the case was reached for trial it was dismissed as to the other defendant served, leaving the plaintiff in error the only defendant in the case. It was not error to allow the plaintiff to dismiss

as to one defendant and to amend her statement of claim. Even assuming that this was done in the absence of notice, by the service of summons the defendant was brought into court, where it was his duty to be and appear until the case was disposed of, and he was entitled to no further notice. This was the holding in Hiemoff v. People, 171 Ill. 343, and Kuppe v. Glos, 251 Ill. 80.

Other points made are not argued. We do not think they have merit.

Finding no error in the statutory record the judgment is affirmed.

AFFIRMED.

215 - 21193

PAUL GILIS,
Defendant in Error,

vs.

B. FRUHLEWICH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT,
COOK COUNTY.

195 I.A. 334

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

We are asked by defendant to reverse a judgment of $257 obtained by plaintiff in a suit to recover money said to have been deposited by plaintiff in a savings bank operated by defendant.

That a man named Lowel Gilis made deposits and is entitled to withdraw the same is not disputed. The only question is whether or not plaintiff is that man. Plaintiff has possession of the bank book issued to Lowel Gilis, and testified that he received it when he opened his account with defendant; that he made the deposits and received the withdrawals entered in the book; that the signature on the identification card was made by him. Witnesses testified that plaintiff is the man to whom this book was issued and who had an account with defendant. Defendant introduced testimony tending to show that the signature of plaintiff was not made by the man who signed the identification card when the account was opened.

Upon consideration of the evidence, including an examination of the disputed signatures, we hold that the identity of plaintiff with Lowel Gilis who opened the account is proven, and the judgment in his favor was right.

Complaint is now made that the court refused to hear argument of counsel for defendant, although no objection

to this was made or exception taken upon the trial. We know of no law requiring the court, trying a case without a jury, to listen to arguments of counsel. Steinke v. Fisher, 191 Ill. App. 172.

The request of plaintiff for statutory damages will not be allowed.

The judgment is affirmed.

AFFIRMED.

235 - 21214

MARGARETHA SCHULTZ, Administratrix of the Estate of FREDERICK SCHULTZ, Deceased, Plaintiff in Error, vs. NATIONAL BREWING COMPANY, Defendant in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

195 I.A. 385

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment of nil capiat entered on a verdict of not guilty returned pursuant to instructions of the court.

The evidence on behalf of the plaintiff tended to show that Frederick Schultz, while employed as a barn boss and engaged in and about his duties near a grain and malt elevator owned and operated by defendant, received injuries from an explosion in the elevator which resulted in his death. There was evidence tending to show the presence in the elevator of quantities of grain dust and the proximity of lighted gas jets; that such dust is of a highly explosive nature and on contact with flame or spark will explode; that this was a dust explosion; that the device used by defendant to remove dust was not effective for the purpose, and that other methods, which a witness described in detail, would prevent such an explosion. It is unnecessary to narrate the evidence in detail or to refer to the evidence on behalf of the defendant.

Where evidence, standing alone, fairly tends to support plaintiff's case, it must be submitted to the jury. Ide v. Fratcher, 194 Ill. 552.

Whether or not the exercise of reasonable care

in providing a reasonably safe place for the deceased to work required the use of another method to avoid explosions was a question for the jury. Stephen v. Duffy, 237 Ill. 549.

Grain dust is highly explosive, and in Commonwealth Electric Co. v. Melville, 210 Ill. 70, it was said: "The care must be commensurate with the danger."

We hold that the question as to the reasonable care of the defendant should have been submitted to the jury, together with the other questions of fact in the case, and that not to have done so is reversible error. See opinion in Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, and the large number of citations therein.

For the reasons above indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

248 - 21239

JOHN BRONSTEIN,
Defendant in Error,

vs.

C. A. SHADE,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

195 I.A. 387

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for money accruing on a contract of employment, for time after his discharge, which he says was wrongful. Upon trial by the court he had judgment for $87.

Many reasons are urged for a reversal, but we shall note only one, which we hold is sufficient to prevent plaintiff from recovering. Plaintiff was employed as a cementer of rubber coats, and the contract provided that "the said John Bronstein guarantees to give the same satisfaction in his work as he has heretofore been giving." The evidence shows that before the contract was signed plaintiff made an average of $18 per week. Under this contract his earnings were guaranteed to be not less than that sum. It is practically uncontradicted that after the signing of the contract, with the possible exception of two weeks, he never earned this amount; that his earnings ran from $10 a week to about $14 a week, and that defendant paid him the difference; that the foreman reproved plaintiff for poor work, showing his defects and urging him to do better; that another employee, who was an examiner of work, found defects in the work and was compelled to return a considerable portion of the same to plaintiff to be done over; that he wasted considerable time during working hours by visiting and talking with other workmen; that he was threatened with discharge unless his work

was bettered, but there was no improvement, and finally he was told to go by the foreman, who stated to him that he was discharged "because I cannot get this work done at all; your work is absolutely no good."

We think the clear preponderance of the evidence justifies the discharge. Hence plaintiff is not entitled under his contract to recover wages for any time thereafter.

The judgment of the trial court is reversed without remanding the cause.

C. Y. [illegible].

320 - 21304

EDWIN S. THOMAS,
Appellee,

vs.

STEPHEN D. SEAMAN and HENRY A. BLAIR,
Appellants.

Appeal from
Municipal Court
of Chicago.

195 I.A. 396

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to have reversed a judgment for $3,334.25 had by plaintiff in a suit to recover purchase money paid on a contract for land and shares of stock, which plaintiff claims was breached by defendants, thereby entitling him to rescind.

The contract is dated March 11, 1911. By it plaintiff agreed to buy and defendants to sell about 80 acres of land in Colorado, and 80 shares of the capital stock of the Seaman Syndicate Ditch Company (an irrigation concern), for $5,400, payable in four installments, $1,800 down, which was paid, and the balance in three installments of $1,200 each, the first due with interest on or before March 11, 1912, the others in two and three years respectively. When the payment due on or before March 11, 1913, was made plaintiff was to be "entitled to an abstract of title and to a warranty deed to said land," and the "Seller agrees to furnish abstract of title and transfer said land and Ditch stock as herein provided." Further provisions are:

> "While buyer is not in default, he may have possession of said premises and use of water on said ditch stock until title, by deed to said land and ditch stock is delivered."
>
> "If seller fails at any time to carry out the terms of this contract, then all the purchase price and the interest that has been paid at such time, may be returned to buyer by seller in full accord and satisfaction of all claims of buyer hereunder."

Also that "time shall be the essence of this contract."

Between March 11th and April 4th, 1911, plaintiff took possession of the land. On April 4, 1911, he paid the installment of $1,200 which was due on or before March 11, 1912, and thereupon by the terms of the contract he became entitled to an abstract of title and warranty deed and the transfer to him of the 80 shares of ditch stock. Defendants did not then deliver any of these and made no tender until December 26, 1912, when a deed was tendered and refused. Plaintiff claims that under the contract defendants have failed to carry out their obligation and that he is entitled to rescind and recover back the money paid on the purchase price.

Plaintiff remained in possession of the premises from about April 4, 1911, until June, 1912, and defendants say in defense that by thus continuing in possession beyond the time specified in the contract for the delivery of the abstract and deed, plaintiff waived the element of time and could not put defendants in default until he had notified them that he would rescind unless defendants performed by a time certain.

Although time be made the essence of a contract, yet this condition may be waived, and a course of conduct by the parties may amount to a waiver. Lancaster v. Roberts, 144 Ill. 213; Monson v. Bragdon, 159 Ill. 61. It would also seem equitable that a buyer should not have the right to rescind and at the same time continue in possession. Opejon v. Engebo, 131 Pac. Rep. 1146.

After consideration of the evidence we hold that plaintiff had the right to rescind and to recover. In April, 1912, plaintiff demanded performance by defendants, saying that if the deed was not forthcoming within three days suit would be brought. Defendants doing nothing, in the following June he abandoned the premises. This notice, with the giving up of

possession, amounted to a rescission and imposed liability on the defendants. At this time the only obligation between the parties was that there was money due and owing from defendants to plaintiff.

It is argued that subsequent letters show that plaintiff in effect waived his rescission, or at least show that he had not intended to rescind. We do not think so. They indicate no more than a willingness by plaintiff to buy the land at the price named in the contract, provided defendants gave or allowed him a sum sufficient to compensate him for damages claimed to have resulted through their delay. No agreement as to the amount of this compensation was ever made.

Neither do we think that the exchange of properties discussed by plaintiff with O'Connor Bros. is of controlling importance. Defendants were urging plaintiff to agree to some kind of settlement of their controversy, and plaintiff, without changing his status with defendants, could investigate as to what kind of sale or exchange of the land he might be able to carry through. What terms he would be willing to make with defendants might well depend on what disposition of the land he would be able to make.

Plaintiff argues that no certificates of ditch stock were ever tendered. Without discussing this, we are inclined to agree with the contention of defendants' counsel on this point, to the effect that under the terms of the contract and according to the method of handling such matters in Colorado no actual delivery of certificates of stock was contemplated by the parties.

Regardless of other considerations this judgment should be affirmed on the broad ground that defendants were required to furnish an abstract and deed within a reasonable time, and

a delay of a year and eight months is unreasonable. In Harding v. Olson, 177 Ill. 298, involving facts similar to those before us, it was held that a delay of four months in delivering a deed of conveyance pursuant to a contract was unreasonable.

For the reasons indicated above the judgment is affirmed.

AFFIRMED.

351 - 20681

CITY OF CHICAGO, Defendant in Error, v. LOUIS ROSE, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 399

MR. JUSTICE BARON DELIVERED THE OPINION OF THE COURT.

In a quasi criminal action brought by the City of Chicago against defendant Rose, plaintiff in error here, for "violation of section 3612 of the Chicago Code of 1911," defendant was found guilty by a jury and assessed a fine of $100, and prosecutes this writ of error to reverse the judgment entered on the verdict.

There is no ordinance in the record, and this has been repeatedly held fatal to a judgment based on an alleged violation of an ordinance.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

351 - 20681

CITY OF CHICAGO, Defendant in Error,	)	
vs.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.
LOUIS KOHN, Plaintiff in Error.	)	

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of the Municipal Court against plaintiff in error, Louis Kohn, fining him $100, entered in a prosecution in that Court for a breach of the peace. The defendant waived a jury. The complaining witness was Isaac A. Doff, a member of the firm of Doff Brothers, cloak manufacturers, and the defendant was a member of a firm doing business under the name of the Kohn Cloak & Suit Company. The Doff firm sold to the Kohn Company, June 6, 1913, a bill of goods on a credit of ten days. It is clearly shown by the order signed by Goldstein, the buyer for the Company, and by Goldstein's testimony that the goods were sold on a credit of ten days, and also by the testimony given for the defendant, that the defendant changed the duplicate of the order so as to show that the goods were bought on a credit of thirty days. July 9, the complaining witness went to the store of the Kohn Company, and demanded payment of the bill. Eisenberg, Manager of the Kohn Company, said the bill was not due. The complaining witness had taken with him Goldstein, the buyer who gave the order, who, on being shown the duplicate order in the possession of the Kohn Company, said that "they doped the duplicate." Angry words were exchanged and Eisenberg sent for plaintiff in error, Louis Kohn. He came and grabbed Doff by the arm to put him out

CITY OF CHICAGO,
Defendant in error,

vs.

LOUIS ROSEN,
Plaintiff in error.

MR. JUSTICE [illegible] delivered the opinion of the court:

This writ of error brings in review a judgment of the Municipal Court quashing plaintiff in error, Louis Rosen, filing his "LOC", entered in a proceeding in that Court for a breach of the peace. The defendant waived a jury. The complaining witness was Leone C. [illegible], a [illegible] of the firm of Leff Jewelers, doing business [illegible]. The defendant was a member of a firm doing business under the name of the Ideal Pawn & Loan Company. The Leff firm [illegible] to the Ideal Company, [illegible], [illegible] on a [illegible] credit of ten days. It is strongly urged by the prosecution signed by Goldstein, the lawyer for the "Company", and by Goldstein's testimony that the [illegible] of ten days, and also by the testimony [illegible] suit, that the defendant received the [illegible] so as to show that the goods were [illegible] on a period of thirty days. July 1, the complaining witness [illegible] the store of the Ideal Company, and [illegible] Eisenberg, manager of the Ideal Company, [illegible] not due. The complaining [illegible] the [illegible] stain, the buyer was [illegible] the [illegible], [illegible] the duplicate order in the [illegible], said that "they dopen the [illegible]." Many [illegible] changed and Eisenberg [illegible] in [illegible], [illegible]

of the store.

Plaintiff in error has not incorporated in the stenographic report the ordinance referred to in the complaint by number only. The statute provides that the Municipal Court shall take judicial notice of ordinances, but this Court cannot do so. If the plaintiff in error desired to preserve for presentation to this Court the question whether the Court could from the evidence properly find defendant guilty of a violation of Section 2012 of the Municipal Code, the Section mentioned in the complaint, he should have incorporated that Section into the stenographic report. Chicago v. Tearney, 187 Ill. App. 441; Chicago v. Loran, 192 Ill. App. 57.

We cannot, on the evidence in this record, say that the Court might not properly find defendant guilty of a violation of said Section 2012, and finding no error in procedure sufficient to warrant or require a reversal of the judgment, the judgment is affirmed.

AFFIRMED.

of the above.

Finally in order for not incorporating in the stenographic report the evidence referred to in the complaints by number only, the trial judge (Judge Wright) and the Appellate Court should take judicial notice of otherwise, for this Court cannot do so. If the plaintiff in error desired to preserve for presentation by this Court the question whether the Court could from the evidence properly find defendant guilty of a violation of section 4(d) of the Municipal Code, the section mentioned in the complaint, he should have incorporated such evidence into the abstract of record.

Chicago v. Cunnea, 351 Ill. 321; see also Chicago v. Jackson, 132 Ill. App. 87.

In the cause, on the evidence in this record, we think the Court might not properly find defendant guilty of a violation of said ordinance, and therefore we reverse the judgment. Judgment reversed.

Reversed.

154 - 31130

IRE PRICE,
Plaintiff in Error,

vs.

THE CHICAGO REAL ESTATE INDEX CO.,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 405

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse a judgment for defendant rendered in the Municipal Court in an action by plaintiff in error against defendant in error. The defendant Company is engaged in furnishing for pay information to its customers regarding the ownership of real estate. Plaintiff recovered in the Municipal Court against one R. Galowich a judgment for $4.0 December 1 , 1913, and through his attorneys on that day inquired of defendant if Galowich was the owner of the real estate known as No. 3431 W. 38th Place, Chicago. The inquiry was by telephone and was answered by some one in defendant's office by telephone, that Galowich was not the owner of said real estate, but one Zuitman was. The attorney asked for a written report and received it the next day. It stated that Zuitman was the owner of the real estate subject to a trust deed from Zuitman to Haugen, trustee, recorded August 16, 1912, to secure $2500 due in various amounts during five years. On the report is the following memorandum:

"In furnishing the above information the company assumes no pecuniary liability to the applicant except in case of special written notice that same is to be used in a legal proceeding, in which case an additional fee must be paid, and this report must be signed by an authorized agent of the company."

One of plaintiff's attorneys testified that it was the custom of defendant in its dealings with them, to

confirm the telephone conversation by such written reports. Plaintiff put in evidence another report sent to his attorneys by defendant, from which it appears that the real estate was conveyed to Zuitman by a deed recorded June 9, 1911; that August 15, 1912, he executed a trust deed to Haugan, trustee, to secure $2500, which was recorded August 16, 1912; that he conveyed the property to Galowich by deed recorded March 15, 1913, and that Galowich conveyed it to Jacobson by deed recorded January 4, 1914.

We think that the memorandum contained in the report made by defendant to plaintiff must be regarded as entering into the contract between the parties, and that as defendant was not notified that the information was to be used in legal proceeding, and the report was not signed by an authorized agent of the defendant, the defendant assumed no pecuniary liability in furnishing such information.

We are also of the opinion that the evidence fails to show that plaintiff, by reason of the incorrect information, sustained damage. The only evidence regarding the title to the real estate was the two reports made to plaintiff by defendant. Each showed a trust deed to Haugan executed by Zuitman, recorded August 15, 1912, to secure $2500. The first report stated that the property was owned by Zuitman and that the Board of Review valued the property at $200 for taxation. There is no other evidence in the record tending to show the value of the property. The second report stated that Zuitman conveyed the property to Galowich by deed recorded March 15, 1913, and that he conveyed it to Jacobson by deed recorded January 8, 1914. It also showed a certificate of levy on an execution against Galowich and that a satisfaction piece was filed, but does not show that the property was sold under the execution against Galowich. We think that on

the evidence in the record the Municipal Court properly gave judgment for the defendant, and the judgment is affirmed.

AFFIRMED.

172 - 21149

JOHN H. NEWALL AUTOMOBILE COMPANY (a corporation), Plaintiff in Error, vs. MICHIGAN AVENUE TRUST COMPANY (a corporation), Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of nil capiat rendered in an action brought in the Municipal Court by plaintiff in error against defendant in error, and tried by the court without a jury. May 27, 1913 a contract in writing was entered into between plaintiff and the Midland Motor Company, whereby the motor company agreed to sell and deliver to plaintiff six automobiles, Model T-6-50, "fully equipped as per catalogue" at $1400 each and to deliver one car by May 29 and the others within two weeks from the date of the contract; and the defendant agreed to pay for said cars, "fully equipped as per catalogue and covered in this agreement $600 cash upon signing of this agreement; this amount being a deposit of $100 on each of the six cars; it being mutually understood that we are to deduct $100 from the net price of each car as delivered, making a balance due of $1300 on each car delivered." The defendant took over the contract and undertook its performance. It delivered two cars to plaintiff for which it paid, but complained that the cars so delivered were not equipped as required by the contract, and notified defendant that it would not accept other cars until they were fully equipped as required by

the contract. The defendant tendered four cars, but plaintiff refused to accept them on the ground that they were not equipped as required by the contract. The defendant then sold the cars for $1300 each and claimed on the trial the right to set off the one hundred dollars difference on each car between the contract price and the price at which the cars were sold, against the claim of plaintiff for the $400 deposited as an advance payment on the four cars.

The decision in the case turns on the question whether the four cars so tendered were fully equipped as required by the contract. It is conceded that the cut in the catalogue purporting to be a cut of the automobile specified in the contract, shows six rims and six tires on each car and a gas tank on the rear of the car, and that the cars delivered and those tendered did not have six rims or six tires. White, a witness called by defendant, testified that the automobiles tendered were not equipped according to pictures and cuts in the catalogue. The specifications in the catalogue do not specify the number of tires or rims. The cuts are a part of the catalogue as well as the specifications, and the contract required the defendant to deliver cars equipped with the number of tires and rims shown by the cuts in the catalogue. The cashier of defendant in a letter to plaintiff dated July 1, 1913, said: "Mr. Hackett (an employee of defendant) advises that the next car you receive is to be delivered without tires, in view of the fact that you had to equip the last one you sold with Firestone tires; we will therefore make a reduction covering the cost of a set of tires from the price of the car." Plaintiff was entitled to receive cars "fully equipped as per catalogue" and was not bound to accept a car only partially equipped and a reduction from the contract price. The evidence fails

to show that the four cars not delivered were tendered to defendant equipped as required by the contract, and he was not bound to accept them and was entitled to recover the amount of the advance payment on such cars.

The judgment of the Municipal Court is reversed and judgment will be entered here for $400 and the costs in this Court.

JUDGMENT REVERSED WITH JUDGMENT HERE FOR $400 AND THE COSTS IN THIS COURT.

186 - 21163

R. J. GROGAN, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
CONSUMERS COMPANY, a corporation, Plaintiff in Error.	

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff Grogan recovered against the Consumers Company a judgment in the Municipal Court for $96.25 for damages to his automobile alleged to have been sustained through the negligence of the driver of a wagon of the defendant Company. Plaintiff was driving east in Jackson Boulevard and defendant's wagon was going east on Loomis Street. The tongue of the wagon struck the automobile and inflicted the damage complained of.

The only ground of reversal urged is that the finding of guilty is against the evidence. We think from the evidence the Court might properly find that the collision occurred through the fault and negligence of the driver of defendant's team, and that the plaintiff was not guilty of contributory negligence, and the judgment will be affirmed.

AFFIRMED.

205 - 21184

L. W. HUBBELL FERTILIZER COMPANY, a corporation,
Defendant in Error,

vs.

D. JACOBELLIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 410

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In an action brought by defendant in error as plaintiff against plaintiff in error Jacobellis in the Municipal Court on a guarantee to pay plaintiff for a car load of fertilizer sold to the Indiana Colonization Society at the price of $467.75, plaintiff had judgment for that amount, to reverse which the defendant prosecutes this writ of error.

April 16, 1914, an order to plaintiff to ship twenty tons of fertilizer to Joe Ogden, signed by Ogden and the Indiana Colonization Society by defendant as president, was forwarded to plaintiff at its office in Buffalo, New York. April 21 plaintiff sent defendant the following telegram: "Buffalo, N. Y. April 21, 1914. D. Jacobellis, 832 W. Ohio St., Chicago. Care Jacobellis Bros. Indiana Colonization Co. not rated, will you personally guarantee payment twenty tons fertilizer ordered, answer collect. L. W. Hubbell Fertilizer Co." The defendant testified that he received this telegram and threw it on the desk. The same day plaintiff received at Buffalo the following telegram: "Chicago, April 21, 1914. L. W. Hubbell Fertilizer Co. Buffalo, N. Y. I will personally guarantee payment 20 tons fertilizer ordered by Indiana Colonization Co. D. Jacobellis."

Defendant testified that he had never sent or caused to be sent to the plaintiff any telegram in relation to any matter. The original of the telegram of April 21, purporting to be a telegram of defendant to plaintiff, was produced at the trial by an officer of the telegraph company, and certain letters and documents signed by the defendant, which he admitted that he signed, were put in evidence. The original of the telegram was marked, "Exhibit 3" for identification, and Wells, a witness for plaintiff, testified that the signature to the telegram was the signature of the defendant. The telegram is not in the record, but having been produced at the trial, identified as the original of the telegram sent by defendant, and testimony introduced concerning it, it must be considered as in evidence, and on the testimony of Wells was properly admitted in evidence; and the question whether it was signed by defendant is one of fact. The defendant admitted the receipt of the telegram from plaintiff of April 21. The telegram purporting to have been sent by him that day stating "I will personally guarantee payment 20 tons of fertilizer ordered by Indiana Colonization Co.," was clearly in answer to the telegram sent by plaintiff and was written by a person who had seen the telegram sent to defendant. It is well settled that when a letter is received in due course of mail, purporting to be in response to a letter previously sent by the receiver, it is presumptively genuine and admissible. Armstrong v. Thresher, 5 No. Dak. 12; People National Bank v. Whitmarsh, 54 Neb. 333; Pelville v. Osborne, 36 Minn. 402; 1st Orenl. Nv. Per. 775-a; 9 Hart. Nv. Per. 1528; Grayville Interurban v. Jordice, 170 Ill. App. 520; Perfume Co. v. Bank, 86 id. 642.

A settled rule is that contracts required to be written may be made by telegram. Western Twine Co. v. Bright,

44 L. R. A. 438; Hawley v. Whipple, 48 N. H. 487; Trevor v. Wood, 36 N. Y. 307; State v. Holmes, 56 Ia. 588.

Whether the rule applicable to letters purporting to be in response to a letter previously sent by the receiver applies to telegrams, is a question that does not appear to have been decided by a court of review in this State, and the authorities in other states are conflicting. Hawley v. Whipple, supra, and Smith v. Caten 54 Md. 138, hold that the rule does not apply to telegrams. We think that the preponderance of authority is in favor of the rule that such a telegram is presumtively genuine and admissible in evidence without further proof of its execution by the party purporting to send the reply. Western Twine Co. v. Whipple (Supreme Court Mo. Oak.); Rodgers v. Kennimore, 41 Atl. 888 (Del. Super.); Oregon S. L. Co. v. Otis, 1[illegible] N. Y. 446; Penolin v. Hammond, 132 Mich. 422. In the case last cited it was said, "it was held in Com. v. Jeffries, 7 Allen 556, the presumption is that when a telegram has been delivered to the telegraph company and accepted by the operator for transmission, it is duly forwarded and received by the addressee. If this presumption obtains, what is to be inferred from the receipt of an answer to such a communication? Is it any less strong than is the receipt of an answer by mail to a letter? We think it is no stretch to say that a presumption arises that such answer was in either case sent by the original addressee. This was held in the recent well considered case of Western Twine Co. v. Whipple, 11 Mo. Oak, 521; 44 L. R. A. 438. We are satisfied with the reasoning of this case and follow it." We also are satisfied with the reasoning in Twine Co. v. Whipple and follow it.

Opposed to the testimony of defendant that he did not send the telegram is the presumption that the telegram was signed or authorized by him because it was in answer to one

32 L. R. A. [illegible]; Hartley v. Atkinson, [illegible]; [illegible] v. Reed, [illegible]; Adams v. [illegible], [illegible].

Whether the rule [illegible] to letters [illegible] by him is presumed to [illegible] applies to telegrams, is a question that [illegible] have been decided by a court of review in this State, and the authorities in [illegible] are [illegible]. Wigmore, supra, and Smith v. [illegible], hold that the rule does not apply to telegrams. We think that the preponderance of authority is in favor of the rule that a telegram is presumed [illegible] without further proof of its [illegible] by the [illegible] to read the reply. Jackson [illegible] v. [illegible] Court Co. [illegible]; [illegible] v. [illegible], [illegible]; Greenwood [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], [illegible]. In the [illegible] it was held in [illegible] v. [illegible], [illegible], the [illegible] is that when a [illegible] to the telegraph company and [illegible] by the [illegible] for transmission, it is duly forwarded and received by the [illegible]. [illegible] presumption [illegible], [illegible] is no inference [illegible] of an answer [illegible]. In [illegible] then is the product of [illegible] that it is no [illegible] such [illegible] was [illegible]. This was held in [illegible] v. [illegible], [illegible]. We are satisfied with the [illegible]. We also are satisfied with the reasoning [illegible] principle and follow it.

Opposed to the [illegible] of [illegible] and when the telegram is the presumption that the telegram was

received by him, and the testimony of Wells that in his opinion the signature to the telegram sent was the signature of defendant, and also testimony of Wells and Hubbell tending to show that defendant admitted that he signed the guarantee.

The defense of res adjudicata and want of consideration were not made by the affidavit of defense nor at the trial, and can not be raised here for the first time.

Waiving the objections stated, plaintiff could recover against the purchaser in one action and against the guarantor in another action, but could have but one satisfaction. "The guarantee is binding when goods are contracted for one day by the principal and the guarantee is executed the next day and delivered to the seller before the goods are delivered by him, because the sale was not complete until the goods were delivered." 1st Brandt Suretyship and Guaranty, Par. 15.

We find no reversible error in procedure and think that on the evidence the court properly gave judgment for the plaintiff, and the judgment is affirmed.

Affirmed.

227 - 21205

GEORGE J. WILLIAMS,
Plaintiff in Error,

vs.

J. C. VENDER,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 413

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment for the defendant entered on a directed verdict in an action by plaintiff in error against defendant in error to recover rent for certain premises for May and the first half of June, 1914, at $37.50 per month. Defendant in error has not filed a brief. The term stated in the lease was one year from May 1, 1913, with the provision that "if said lessee does not give said lessor written notice sixty days prior to the expiration of this lease of his intention to vacate said premises at the expiration of the term hereby granted, the failure to give such notice shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor." The lessee did not give notice of his intention to vacate. The habendum clause in the lease is as follows: "To have and to hold the above described premises with appurtenances unto the said lessee from the first day of May, A. D. 1913, until the 30th day of April A. D. 1914, except as hereinafter provided." The provision above quoted as to the renewal of the tenancy in case the lessee failed to give notice of his intention to vacate is not a mere covenant which may be specifically enforced in chancery, or on which an action at law may be maintained for a breach of the covenant; but is a present demise in case the lessee

does not give written notice of his intention to vacate the premises within the time fixed by the lease. The bringing of the suit was an election by the lessor to renew the tenancy for one year on the failure of the lessee to give the notice of his intention to vacate and the lease being thereby extended for one year the lease became the same in legal effect as if the term and the covenant to pay rent had originally in express terms embraced two years as well as the other portions of the lease.

The contract embodied in the lease is an entire one, and the same consideration which supports the other provisions of the lease will support the provision that the failure of the lessee to give the notice provided for in the lease, shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor. Defendant vacated the premises April 30, 1914, and the lease provided that in case he should vacate, the same might be relet by the lessor for such a rent and upon such terms as he might see fit, and if a sufficient sum should not be thus realized to satisfy the rent thereby reserved, the lessee agreed to satisfy and pay the deficiency. Plaintiff was not able to rent the premises until June 15, and he was entitled to recover the deficiency in the rent reserved.

The Court erred in directing a verdict for the defendant, and for that error the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

267 - 21250

PEOPLE OF THE STATE OF ILLINOIS)
ex rel. MARY VOLSKA,)
Defendant in Error,)
) ERROR TO MUNICIPAL
vs.)
) COURT OF CHICAGO.
VINCENT MURPHY,)
Plaintiff in Error.)

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

On the complaint of relator, Mary Volska, the defendant, Vincent Murphy, was found guilty of bastardy and prosecutes this writ of error to reverse the judgment entered on such finding. The only question in the case arises on defendant's plea of the Statute of Limitations. The statute provides, "that no prosecution under this act shall be brought after two years from the birth of the bastard child, provided, the time any person accused shall be absent from the State shall not be computed." The child of complainant was born May 20, 1911. A warrant in the bastardy proceeding was issued October 30, 1911, but complainant was unable to serve the warrant and the proceeding was abandoned. The complaint in the present case was filed January 21, 1915. The defendant when in Chicago lived with his mother at 92nd Street and Buffalo Avenue. The relator testified that defendant remained in Chicago up to about the 22nd of September, that he left about October 3., 1911, and she did not see him nor know where he was until September, 1914. Lillian Hindman, the Secretary of the Court of Domestic Relations, testified that she went to the neighborhood of 92nd Street and Buffalo Avenue two or three times a week from the time the child was born to September, 1914, and did not see defendant at any place in Illinois during that time. The witness was not cross examined nor did de-

fendant offer any testimony to explain or contradict the testimony given for the prosecution.* If the defendant was not absent from the State from October 3[illegible], 1911, when the first warrant was issued, until September, 1914, the matter was peculiarly within his knowledge.

Prima facie proof of evidence is that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed, and, if not rebutted, remains sufficient for that purpose. *People* v. *Ry. Co.*, 249 Ill., 97-100.

We think that the evidence for the prosecution made a prima facie case that defendant was absent from the State between the dates mentioned, and defendant offered no evidence to contradict or rebut such *prima facie* case. The Court properly entered a finding and judgment against him. The judgment of the Municipal Court is affirmed.

AFFIRMED.

20 - 20506

LIBERTY A. CLAIMANT, a corporation,
Defendant in Error,

vs.

THE ALAINI COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment for $246.68 against defendant for merchandise sold and delivered, and defendant has sued out this writ of error in an endeavor to have this court reverse that judgment. Many errors are assigned, but they find little support in the record. The question of the liability of defendant for the obligations of a former corporation, which it succeeded, and the relation of Kahn and Stewart to the defendant were discussed and settled by this court in Quinlan v. Alaini, 191 Ill. App. 568, to which case we refer and the opinion in which we adopt so far as those questions are there settled.

We think the greater weight of the evidence sustains the finding and judgment. That there was an agreement as to the amount of the claim is denied only by Stewart, the president of the defendant company. Aside from that, it is clear that on the amount agreed upon by Stewart as due, defendant paid the sum of $400 twice, and the balance of the sum due is the amount of the judgment. In this condition of the record the court might, as it did, find that there was an account stated between the parties, notwithstanding the subsequent claim of Stewart to the contrary. The letter of defendant, transmitting a check for $400 on account, is sufficient corroboration of the testimony of Voorhees that there was an agreement as to the

amount due and a promise by Stewart to pay the same. This letter says, the check was sent "as promised."

Defendant complains that the account attached to the deposition is in the French language and offends the constitutional provision that all court proceedings shall be in the English language. We are unable to verify this claim by the record. In this account and in others appearing in the claim of plaintiff and in some amendments thereto, the amounts in the accounts are stated in francs and centimes, which, it is true, is a statement of French and not of American money. But notwithstanding this fact, the American equivalent for the French money is stated in the accounts as well as in the statement and affidavit of claim, making it apparent that defendant could not have been misled, and, furthermore, there is no evidence that the sum stated as the American equivalent for the amount stated in French money is not correct.

There are no merits in defendant's defense, and the judgment of the Municipal Court is affirmed.

[illegible].

24 - 20538

LOUIS FRIEDMAN,
Defendant in Error,

vs.

SCHREIBER BROTHERS CO., a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

1951.A.418

MR. JUSTICE MOLTON DELIVERED THE OPINION OF THE COURT.

This action involves a contract of employment, executed by both parties to this suit, which is in the following words:

"Memorandum of agreement made this 31st day of August, 1912, by and between Louis Friedman, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Schreiber Brothers Co., a Corporation, duly organized under the laws of the State of Illinois, party of the second part, witnesseth:

That the said party of the second part hereby employs the said party of the first part in the capacity of Foreman, Rectifyer and Supervisor of the business of said Corporation, for which said corporation agrees to pay said party of the first part for such services the sum of Twenty-seven Dollars and Fifty Cents ($27.50) every week, said payments to begin on September 1st, 1912, and every week thereafter to September 1st, 1913; and the sum of Thirty Dollars ($30.00) every week beginning from September 1st, 1913, to September 1st, 1914; all of above mentioned payments are to be made on Friday of each week.

The said party of the first part agrees during the time of this contract not to engage in any other line of business, and shall receive two weeks vacation each year with full pay."

Plaintiff was discharged by defendant December 1st, 1913, without cause, and received substantially payment at the rate fixed by the contract to the time of such discharge. Plaintiff brought this suit for compensation, at the contract rate, during the time covered by the contract that he was out of employment. He was again employed February 14, 1914. Plaintiff recovered a judgment for $500, and defendant seeks this review.

If plaintiff is entitled to recover, it is conceded that the amount of the judgment is right. Defendant offered no evidence but rested its defense on the claim set up in certain propositions of law, which the Court refused to hold as the law of the case. These propositions are in substance, that the contract is void for lack of mutuality and for indefiniteness as to time; that plaintiff could recover wages only for the time he actually worked and that the defendant could terminate the contract at its pleasure.

The trial Judge's rulings on these propositions of law are without error.

The contract is susceptible of but one construction, and that is that it was a contract of employment for two years. True it is that the time in so many exact words is not stated; but equivalent words are readily found in it. Plaintiff was employed as "Foreman, Rectifyer and Supervisor" of defendant's business. He was to be paid for his services the sum of twenty-seven dollars and fifty cents every week, said payments to begin on September 1, 1912, continuing every week thereafter to September 1, 1913, and the sum of thirty dollars every week from September 1, 1913, to September 1, 1914. These payments, it will be seen, cover two years of time. Plaintiff further agrees not to engage in any other line of business during the time of the contract, and it is provided by the contract that he is "to receive two weeks vacation in each year with full pay."

The contract has mutual covenants which bind the parties. It is clear that these covenants continue over a period of two years- the time during which the salary is provided to be paid. If there was any lingering doubt about the time limit of the contract, after consideration of the foregoing recitations therefrom, the added provision that

plaintiff shall have "two weeks vacation each year with full pay" removes it. "Each year" refers to "each year" of the two year contract. In this regard we are unable to discern any ambiguity in the contract.

The judgment of the Municipal Court being without error is affirmed.

AFFIRMED.

63 - 21028

RALPH E. HYATT, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
A VOLNEY FOSTER, Plaintiff in Error.	

195 I.A. 428

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Plaintiff was employed by the United States Silica Company, of which defendant was president, and also by defendant in the interest of the Estate of Volney V. Foster, deceased, at a salary of $250 a month, $150 of which was paid by the Silica Company and $100 by the Foster Estate. It was also agreed that plaintiff should have 20 per cent of the profits of the Company in excess of $10,000 per year. In the manipulation of the Silica Company accounts by plaintiff it appears, and is not disputed, that plaintiff overdrew his account to June 30, 1912, to the amount of $3483.23. During such employment plaintiff had a verbal agreement with defendant that he should receive one-fifth of the profits of a certain deal made with the Thornton Stone Company. It was subsequently agreed between them that plaintiff's share of such profits was $635. This item of $635 is the subject matter of this suit. A trial by the Court resulted in a finding and judgment for $635 in favor of plaintiff, and this writ of error seeks our review of the record of that judgment.

The sole question presented for determination on this review is: Was the interest of plaintiff in the Thornton Stone Company profits assigned to the United States Silica Company? The evidence proves that on August 27, 1912, defendant wrote plaintiff a letter substantially as follows:

"August 27, 1912.

Ralph E. Hyatt,
Chicago.

Dear Sir: I hand you herewith statement of accounts of U. S. Silica Co. to July 1, 1912, made by Audit Co. of Illinois. You will note the wide discrepancy between your overdrafts as they appear on your books and as analyzed by the Audit Co. as follows:"

Here follow the items of debit and credit which show the state of the accounts and conclude with the item of "Overdrawn as of June 30, 1912, $3,483.23," and continues:

"In accordance with my understanding with you, you were to receive in addition to your salary of $150 per month, you shall receive a bonus of 20% of the net profits of the company in excess of $10,000 per year.

There is a wide discrepancy between your books and the report of the Audit Co. with reference to your account and you admit the falseness of your account in that respect.

Two courses are now open to me in recovering the company's loss. First: By applying to the Surety Company for compensation under their surety bond which we hold guaranteeing your honesty. Second: To retain you in your present position under the following conditions:

1. You to give the company your 5% demand note for $3,483.32 together with any amounts you may have drawn since June 30, 1912, in excess of your regular salary of $250 per month * * * and that said demand note shall be reduced by $100 each month to be taken out of your salary of $250 per month until all the above note with interest is cancelled.

2. That you assign to the Silica Co. all profits which may be coming to you in accordance with your understanding with me, in connection with Thornton Stone Co., said profit, if any, to apply toward reduction of your note.

3. All bonuses accruing to you shall apply on above note until it is paid with 5% interest.

4. The Audit Company have promised to say nothing to the injury of your reputation, and I also bind myself to the same condition.

Very truly yours,
A. Volney Foster."

Defendant testified that he had some conversation with plaintiff about the letter and that plaintiff said to him on the day after its date that the proposition outlined in the letter was acceptable to him. This testimony is not denied. Plaintiff's contention is that he had no talk with defendant about assigning the Thornton Stone Co. claim to the Silica Company. On the proposition as to the acceptance of the terms of this letter, let us see what the parties did that is not controverted.

Plaintiff continued in his employment until the following April. He gave to the United States Silica Co. his demand note for $3,525.66, which plaintiff testified was the amount due according to the letter, with accounts overdrawn since June 30th added. There is no evidence that the Audit Company or defendant said anything after the date of the letter to plaintiff's injury, thereby keeping the compact under Item 4 of the letter. Another indication of plaintiff's acceptance of the terms of the letter is the fact, admitted by him, that he kept it.

The proposition of law tendered the court by defendant to the effect that if plaintiff accepted the proposition contained in the letter of August 27, 1912, assigning his claim for profits in the Thornton Stone Company contract to the United States Silica Company, then he could not recover, stated a correct proposition of law, and it was error for the trial Judge to refuse to hold it as such. The evidence likewise proves as a fact that the claim of the plaintiff against the defendant for profits in the Thornton Stone Company contract was assigned before the commencement of this suit to the United States Silica Company, and it was error for the Court to hold to the contrary.

No particular form is necessary to the effective assignment of a chose in action. It may be assigned orally, and written evidence of such an assignment is not necessary. Barrett v. Hogan, 177 Ill. App. 311; Pearson v. Luecht, 199 Ill., 475; Savage v. Gregg, 15 Ill. 161.

The unconditional acceptance by plaintiff of the offer in the letter above set out, which included the assignment of the interest of plaintiff in the Thornton Stone Company contract to the United States Silica Company, operated to pass the title thereto to the Silica Company

immediately. Defendant was acting for the Silica Company in the transaction, and the offer in the letter, though made by defendant, was by construction for the Silica Company, whose officer he was and for whom he acted and whose employee plaintiff was at the time.

The judgment of the Municipal Court is reversed and a judgment of nil capiat and for costs will be entered in this Court.

REVERSED AND JUDGMENT OF
NIL CAPIAT HERE.

95 - 21068

J. SPENCER TURNER COMPANY,
Defendant in Error,

vs.

BRUNO SCHMIDT,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 432

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment of the Municipal Court against defendant in the sum of $10,561.77 and for costs.

Defendant entered his appearance and when ruled to file an affidavit of meritorious defense failed to do so. Nothing but the statutory record is before us. This shows that notwithstanding his default previously entered of record, defendant was present by counsel at the trial, also when the court gave leave to the plaintiff to increase the amount of the ad damnum and when judgment was entered after the overruling of defendant's motions for new trial and in arrest of judgment. The record likewise shows that defendant waived a trial by jury.

Defendant now contends that it was error to proceed to trial without plaintiff having amended its statement pursuant to leave granted on its own motion - that he should have been ruled to plead after leave to amend statement of claim had been given and before assessment of damages.

We think a sufficient answer to all these contentions is, that defendant stood by and without objection allowed the cause to proceed. If he had any objection to make as to procedure it was his duty to make such objection upon the trial. Not having done so, these irregularities are waived.

Objections of the nature of those now made cannot be raised in this court for the first time.

The objection that the judgment exceeds the amount of the ad damnum comes too late when raised on review for the first time. A. T. U. R. v. Hagley, 164 Ill. 340; Hoening v. North American, 155 Ill. App. 528. However, defendant could not have been misled as to the amount actually due, notwithstanding that a lesser sum than was due appears in the statement of claim. Copies of the notes on which the suit was founded were a part of plaintiff's pleadings, and fully informed defendant of the nature of the claim and the amount due thereon. The aggregate amount due on these two notes on the day of the trial is the amount of the judgment rendered by the court.

No propositions of law are found in this record. It is held in Davies v. Phillips, 27 Ill. App. 387 and in many other cases, that where a case is tried without a jury and no propositions of law are submitted to be held by the trial court, it will be presumed that all questions of law were correctly decided.

The defendant's motion for a new trial preserved no questions of law for review. A motion for a new trial in a case tried before the court without a jury is aimless and serves no purpose available in a higher court. Climax Tag Co. v. American Tag Co., 234 Ill. 179.

The judgment of the Municipal Court being free from reversible error, is affirmed.

AFFIRMED.

objections of the nature of hearsay [illegible]
in this court for the first time.

The contention that the judgment [illegible]
of the [illegible] cannot be held [illegible]
the final bar. [illegible] v. [illegible], [illegible]
v. [illegible], [illegible] (1[illegible]). [illegible]
could not have been [illegible] to the [illegible]
notwithstanding that [illegible] the
the abandonment of [illegible]
[illegible] v. [illegible] [illegible]
fully informed [illegible] of the [illegible]
[illegible]
notes on [illegible] day [illegible]
[illegible] by the [illegible].

No [illegible] of [illegible] in this [illegible],
it is held in [illegible] v. [illegible], [illegible] [illegible]
many other [illegible], that [illegible]
and no [illegible] of [illegible]
trial court, [illegible]
[illegible].

The defendant's [illegible]
no question of [illegible] for [illegible]
a case tried [illegible]
serves no purpose [illegible] v. [illegible], [illegible]
[illegible] (1[illegible]).

The judgment of the [illegible]
reversible error, is affirmed.

118 - 21092

E. H. BAYLEY,
Defendant in Error,

vs.

A. E. COY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 433

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On the trial of this cause by the court a judgment for $787.50 was rendered against defendant and in favor of plaintiff and defendant brings the cause before us by writ of error.

The questions involved are mainly of fact. Defendant, it is claimed, was the agent of plaintiff to purchase 35,750 shares of stock of the Mina Grand Mining Company. Plaintiff gave defendant $1,787.50 with which to purchase the stock, upon the representation of defendant that such stock could be bought for that sum and no less. Subsequently plaintiff ascertained that defendant bought 40,000 shares of said stock for $1,000 and applied to his own use, unbeknown to plaintiff, the remaining $787.50, together with 4,250 shares of the stock.

The evidence consisted partly of correspondence between the parties and partly of other documentary and oral proof. This evidence amply sustains the contention of plaintiff that defendant was acting as his agent in this transaction. It clearly appears that for a long time defendant had been in the confidence of plaintiff in various deals in stock and that he was in the habit of confiding in defendant's representations in regard thereto. In the

transaction in question the proof demonstrates beyond a doubt that plaintiff implicitly trusted in all of defendant's representations regarding the price for which the stock could be bought and in faith of the verity of such representations parted with his money. The plaintiff lived in Lake City, Minnesota, while defendant lived in Chicago. Defendant lulled the unsuspecting plaintiff into inaction, put him off his guard, and anticipated any inquiry from independent sources, if plaintiff should have had any such intention in mind, by writing plaintiff under date of March 22, 1906: "I am having the stock transferred as per your instructions and will send the same to you by registered mail this afternoon. You must promise to never say to any one anything about the price paid nor from whom you did the business with. You know I am supposed to do what I can to sell treasury stock for 20¢ per share, but I could not let the opportunity pass to let you in on this deal."

While the sentence italicised is wretchedly ungrammatical, the meaning intended to be conveyed thereby is apparent and could not well be misunderstood. That defendant was guilty of duplicity is inferrable from the last paragraph of the letter quoted, and that defendant did let plaintiff "in on this deal," in the vernacular of the street, and defendant's letter is sorrowfully conceded by plaintiff.

Defendant urges the statute of limitations as a defense. In the circumstances of this case the statute did not commence to run until plaintiff discovered the fraud defendant had practised upon him. It is a sufficient answer to this contention that this suit was commenced within the period of the statute applicable to this class of cases, after plaintiff discovered the fraud and duplicity practised upon him by defendant. The principle laid down in Purcell v. Great

transaction in question the great commercial loyal [illegible] doubt that plaintiff explicitly stated to [illegible] representations respecting the quality for which they could be bought and in fact of the reality of the [illegible] parted with his money. The plaintiff lived in the [illegible] Minnesota, while defendant lived in Chicago. [illegible] the unexpected plaintiff into Minnesota, put his off [illegible] guard, and mislighted any inquiry from independent [illegible] if plaintiff would have had any such intention in mind, [illegible] within plaintiff under date of June 20, 1921. "I am having the stock transferred as you gave instructions and will send the same to you by registered mail this afternoon. [illegible] attempt to never use it and the [illegible] [illegible] [illegible] from whom you got the [illegible]. [illegible] supposed to do that I can do will immediately [illegible] shape, but I could not [illegible] [illegible] in on this deal."

While the [illegible] transaction, the [illegible] intended to be [illegible] [illegible] and could not be [illegible]. [illegible] was guilty of [illegible] from the [illegible] of the latter [illegible] "in on this deal," is the [illegible] of the [illegible] latter is [illegible] by [illegible].

[illegible] defense. In the [illegible] not conducive to [illegible] defendant had [illegible] [illegible] to this conversation [illegible] [illegible] plaintiff discovered the [illegible]

Western Tel Co., 161 Ill. 522 at page 596, that "With reference to whether a cause of action is barred in equity, the rule may be stated, that where a cause of action arises from a fraud, the Statute of Limitations will not begin to run nor laches apply until the discovery of the fraud, or from the time when the fraud could have been discovered by the exercise of reasonable diligence; but in the latter case the failure to use diligence is excused where there is a relation of trust and confidence, rendering it the duty of the party committing the fraud to disclose the truth to the other" is equally the rule at law and consequently is to be applied in this case. Defendant committed fraud when he failed to inform plaintiff of the true price he paid for the stock, which fraud was accentuated by his letter of March 22, 1906, wherein he made statements calculated to deter plaintiff from making inquiries on his own account.

An examination of the several propositions of law found in the record convinces us that the holdings of the trial judge thereon were correct.

The judgment of the Municipal Court is without error and is affirmed.

AFFIRMED.

[illegible] Co., 171 Ill. 387 [illegible]

reference to whether a person or [illegible] the rule may be stated, [illegible] from a fraud, [illegible] to run not [illegible] or from the time [illegible] by the exercise of reasonable [illegible] case the failure to use diligence [illegible] a relation of trust and [illegible] the party committing the fraud [illegible] other" is usually the rule in law and [illegible] applied in this case. [illegible] failed to inform [illegible] case, with fraud [illegible] 77, 1903, [illegible] [illegible]

An examination of the [illegible] fraud in the fraud [illegible] [illegible]

The judgment of the [illegible] error and is affirmed.

196 - 21173

HYDRAULIC ENGINEERING WORKS,
a corporation,
Defendant in Error,

vs.

GEORGE B. WILLIAMS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

195 I.A. 439

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before the Court without a jury the plaintiff recovered a judgment against defendant for $160.95, to reverse which defendant brings this writ of error.

The facts involved in this controversy, tersely stated, are that defendant owned an automobile which he delivered to one Alfred Richter to repair. Richter had theretofore repaired the same automobile for defendant. It seems that Richter did some work on the automobile and then took it to the shop of plaintiff with the request that it finish the job, which it did. Defendant had an agreement with Richter to do the repair work on the automobile for $2[illegible]. The amount of the judgment is the value of the work done by plaintiff on the automobile of defendant at the request of Richter. Defendant offered to prove that he had paid Richter the contract price for making the repairs. This offer was ruled out, and rightfully, the only question presented for decision being whether there was, as to said repairs, any contractual relationship between the parties to this cause.

A careful perusal and weighing of the evidence in the record convinces us that it falls far short of preponderating in plaintiff's favor on the crucial point of the privity of contract between the parties sufficiently to

charge defendant with liability to plaintiff. This elementary legal requirement cannot be dispensed with. Plaintiff has not only failed to prove its cause of action, but, on the contrary, the evidence in the record clearly establishes the defense interposed to the claim involved in this suit.

The Municipal Court's judgment is contrary to the evidence. It ought to have been for defendant. The judgment is therefore reversed and a judgment of nil capiat and for costs will be entered in this Court.

REVERSED AND JUDGMENT OF
NIL CAPIAT AND FOR COSTS
HERE.

234 - 21213

FRANCO-AMERICAN HYGIENIC CO., a corporation, Plaintiff in Error, vs. EDWARD J. CHLADEK, Defendant in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

1951.A.443

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On October 9, 1911, defendant signed and delivered to plaintiff the following guarantee contract:

"In consideration of your entrusting to
Name Jessie B. Gordon
Address Lincoln, Ill.
from time to time while in your employ, such goods and sample cases as you may deem it advisable for her to use in her capacity as Traveler for you,

I HEREBY GUARANTEE that she will return any samples and goods furnished her within thirty days after written demand has been mailed to her above address. Should she fail to return such goods and samples furnished her within thirty days after demand having been made, or having done so, if there still remains a balance on her account unpaid, I agree to pay for same, not to exceed the sum of fifty dollars.

FOR THE PURPOSE of securing this credit for her, I state that I am worth one thousand dollars over and above all debts, liabilities and exemptions.

IT IS UNDERSTOOD that a series of transactions is contemplated and this guaranty is for the purpose of covering any balance that is or may become due after demand for settlement has been made.

THIS SURETY shall remain in full force and effect until withdrawal of same shall be received and duly acknowledged in writing by the Franco-American Hygienic Company.

Signed Edward J. Chladek."

A trial before the court resulted in a finding for defendant, to reverse which finding, and for judgment in its favor in this Court, plaintiff has sued out this writ of error.

After receipt of the foregoing guarantee plaintiff employed Jessie B. Gordon, therein named, as traveling saleswoman and entrusted to her certain of its goods. On the severing of the relations between plaintiff and Miss

Gordon there appears from a statement rendered to her by plaintiff to be due plaintiff the sum of $71.14, which sum neither Miss Gordon nor defendant paid. The following facts were agreed upon at the trial:

That defendant signed the guarantee pleaded and turned it over to Miss Jessie M. Gordon, therein named, and that said Gordon owes plaintiff $71.14. The defense is that the guarantee was given October 9, 1911; that defendant heard nothing about it until 1913; that he received no consideration; that defendant received notice neither of the acceptance of guarantee nor of default by Gordon; that no demand was made on defendant to comply with the guarantee, and that time in which to pay was extended to Gordon.

The guarantee was without limitation as to time, but the amount guaranteed was limited to $50, the amount sought to be recovered in this suit. The consideration of defendant's guarantee was the employment of Miss Gordon, and she was so employed. This is a sufficient consideration to bind defendant to his undertaking. There being no limitation as to time, an action can be maintained at any time within the running of the Statute of Limitations affecting such contracts. If defendant had desired to terminate his liability, he could have done so by giving notice to plaintiff, as provided by the terms of the guarantee. This he did not do. Notice of the acceptance of defendant's undertaking was not necessary. Proof of a demand for settlement, made upon Miss Gordon, and evidence of her having received such demand, appear in the record. If extension of time of payment to Miss Gordon had been made a matter of defense - which it was not - it would be a sufficient answer to say that there is no evidence in the record that any

extension was granted.

In Fort Dearborn National Bank v. Miller, 178 Ill. App. 454, the Court say: "In a suit on a collateral, continuing guaranty, such as was sued on in this case, a prima facie case is made when the plaintiff makes proof of the indebtedness and the guaranty; and the fact that no suit was brought against the original debtor, and that no notice was given to the guarantor of the default of the principal debtor, if a defense at all, is such a defense as must be specially pleaded by the guarantor." The facts in evidence fully satisfy these requirements.

If defendant was entitled to notice and did not receive it, such fact could only be availed of as a defense to the extent that he may have suffered loss or damage as a result of such failure to notify him. Swisher v. Deering, 204 Ill. 203. No evidence on these lines was offered by defendant. Hearingn v. Ortlepp, 167 Ill. App. 586.

Defendant interposed no defense in the trial court, and has failed to file briefs on this review.

Plaintiff established by its proofs the right to recover the amount of its claim. In not giving judgment therefor the trial Court erred.

The judgment of the Municipal Court is reversed and a judgment entered in this Court in favor of plaintiff against defendant for the sum of $50.

JUDGMENT REVERSED AND JUDGMENT HERE FOR $50.

244 - 21225

THE STANDARD BREWERY,
a corporation,
Defendant in Error,

vs.

JOHN LYNCH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

195 I.A. 445

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The parties to this action are respectively brewer and saloon keeper. The defendant entered into a contract with plaintiff, dated the 27th of March, 1908, ~~by which defendant~~ agreed to purchase and receive from the brewery, and from no other person, firm or corporation, all the domestic draft and bottled beer which might be kept for sale or sold by him, his agent or his servant, at, ~~kept~~ in or about his saloon at 2012 Dearborn street, Chicago, from the first of May, 1908, to the thirtieth of April, 1911, except some Budweiser beer, and the brewery agreed ~~on its part~~ to furnish during that time all the beer necessary to supply defendant's needs. Plaintiff also agreed to supply defendant with certain saloon furniture and fixtures.

The contract provides that in case of ~~its~~ breach by defendant, he should pay to plaintiff the sum of $200 "as and for its liquidated damages for and on account of loss of profits on the sale of beer by reason of such breach of contract," and in addition ~~thereto~~ pay ~~to plaintiff~~ the sum of $200 for the reasonable rental for the use of furniture and fixtures furnished under the contract and as reimbursement for ~~its~~ expenses incurred in ~~and about~~ equipping ~~said~~ the premises for the conduct of defendant's ~~saloon~~ business.

The contract further provides that if defendant, his heirs, etc., have domestic beer of other manufacturers

than plaintiff upon his saloon premises, such fact shall be deemed and taken to be a breach of this contract and shall entitle the plaintiff to the damages specified, ~~therein.~~

Defendant in his affidavit of defense denied that he executed the contract, or that he ever had any ~~business~~ dealings with plaintiff, ~~or that any business relationship existed at any time between plaintiff and himself,~~ and further denied that there was at any time any domestic beer of the manufacture of any person, firm or corporation other than plaintiff sold at the saloon or kept on the saloon premises, except Budweiser beer; averred that Mrs. Jahn owned and ran the saloon, and that he was only her bar-keeper and never had any financial interest in the saloon except to draw his wages.

The trial was before a court and jury and resulted in a verdict and judgment for $400, and defendant seeks this review.

The jury have decided the conflict in the evidence between the parties, and we are not disposed to disturb such finding. The evidence of plaintiff uncontradicted is amply sufficient to sustain the verdict, and the jury might well have disbelieved defendant's testimony and that of his witnesses where it was in conflict with that of plaintiff. This was their province. Their facilities were much better than ours in determining the facts, because they had the witnesses before them and could observe their manner and demeanor upon the witness stand, their candor or lack of it in giving their testimony - privileges not available to us - and therefrom were better able to decide as to who was worthy of credit and to give credit accordingly.

Defendant denied everything which was material

to sustain the plaintiff's cause of action. He denied that he had any interest in the saloon business or was anything but a bar keeper for Mrs. Jahn, although he admitted that the license to operate the saloon and the "beer book" were in his name. The jury may have regarded - as we would - such evidential facts as controlling and have discredited that part of defendant's testimony which was in contradiction to these essential, controlling and admitted facts.

We think the damages provided to be paid by the contract for the breaching of it by defendant are in the nature of liquidated damages and not in the nature of a penalty. We so construe the contract. Its recitations so demonstrate, and all of its provisions are akin to the cases of Standard Brewery v. Schmalhausen, 175 Ill. App. 629, and A. & H. Brewing Co. v. Modzelewski, 269 Ill. 539.

As said in Linkney v. Weaver, 216 Ill. 185, "Here the parties in their written contract, in plain terms expressed their intention that the sum of $300 ($500 in the case at bar) should be treated as liquidated damages. The circumstances which should enter into consideration in the ascertainment and computation of the damages that would actually or most probably result from a breach of the contract were well known to the contracting parties. Fraud or circumvention is not suggested, and there is nothing to indicate that the amount is unconscionable or disproportionate to the damages apparently likely to result from the breach. It was not error to treat the sum named as liquidated damages."

This reasoning is of equal force in the interpretation of the contract in the case at bar. Plaintiff was entitled to recover as liquidated damages, for defendant's breach of the contract in failing to purchase all its domestic beers from plaintiff, $200, as therein provided, also the further

sum of $[illegible] for the reasonable rental of the saloon fixtures furnished, and as reimbursement for expenses incurred in installing such fixtures. These sums combined were the amount of the verdict and judgment, and they are without error.

While we have read defendant's brief and argument, it was not prepared in conformity to the rules of this Court. It violates rule 21, which provides that "the brief should contain a short, clear statement of the points and the authorities in support thereof." We call this to the attention of counsel for his guidance in the future.

The judgment of the Municipal Court being without error is affirmed.

Affirmed.

275 - 21258

EDWIN D. EDELL as Trustee in Bankruptcy of the U. S. Bellastone Company, a corporation,

Appellant,

vs.

ERNST H. KASTOR, RICHARD H. KASTOR, AARON BORENWEISER and FREDERICK W. McKINNEY,

Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

1951 I.A. 464

MR. JUSTICE HULBERT DELIVERED THE OPINION OF THE COURT.

For the reasons assigned in opinion this day rendered in case No. 21259, the decree of the Circuit Court in this case is affirmed.

AFFIRMED.

89 - 21475

WILLIAM H. BROWN & COMPANY, a corporation, Defendant in error, vs. H. V. HIRSCH, Plaintiff in error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 465

MR. JUSTICE HULBERT DELIVERED THE OPINION OF THE COURT.

Defendant in error moves the Court to strike from the files the document certified by the trial Judge to be a "Statement of facts appearing upon the trial * * and all questions of law involved * and the decisions of the Court upon all such questions of law" and to affirm the judgment. It is first urged that the document was not certified within the time prescribed by the Municipal Court Act. Counsel for plaintiff in error used due diligence to procure the trial Judge to so certify, but unfortunately the Judge was indisposed and out of the State and could not therefore be reached. We do not, however, deem it necessary to pass upon such objection. We shall place our decision of this motion on the broader ground that the document certified by the trial Judge contains neither a statement of facts appearing upon the trial, the questions of law involved, nor the decision of the Court upon such questions of law. What the document certified by the trial Judge contains is the testimony of the witnesses in narrative form; this is all. No questions of law appear and consequently no decisions of the Court upon questions of law. It is not certified as a stenographic report and the context shows that it is not such a report. Neither does it appear that the testimony set forth was all the evidence heard or preferred upon the trial.

this is far from satisfying the statutory requirement. The document certified presents nothing for review. This motion comes within the ruling in Kurford v. Leslie, 151 Ill. App. 605, in which this Court said:

> "The statute prescribes the condition for the review by this court of a judgment of the Municipal Court in cases of the fourth class. To authorize such review, the trial judge must sign and place on file in the case either 'a correct statement of the facts appearing on the trial,' or a 'correct stenographic report of the trial.' Clause seven of said section 23 provides that, 'No order or judgment sought to be reviewed shall be reversed unless the Supreme Court or Appellate Court, as the case may be, shall be satisfied from said statement or stenographic report, or reports, signed by said judge, that such order or judgment is contrary to law and the evidence, or that such order and judgment resulted from substantial errors,' etc. Under this provision we can look only into such statement or stenographic report as the act provides for and requires to ascertain whether the judgment is contrary to the law and evidence, or resulted from substantial errors of the court, and it follows that unless there is in the record such statement or stenographic report, the judgment must be affirmed."

Schumacher v. Clancy, 152 Ibid 37, is to the same effect.

In this record there is no such statement or stenographic report as the statute provides for and requires; therefore the document found in the record and certified as a statement is stricken from the record and the judgment of the Municipal Court is affirmed.

[illegible].

300 - 19791

BERNHARD WEINSTOCK, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
vs.	
HARRY MANASTER and HERMAN H. LIPMAN, Appeal of HERMAN H. LIPMAN, Appellant.	

195 I.A. 466

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Bernard Weinstock, appellee, (hereinafter called plaintiff,) brought an action on the case in the Circuit Court of Cook County against Harry Manaster and Herman H. Lipman, (the latter the present appellant and who will hereinafter be referred to as the defendant) to recover damages alleged to have been caused tothe building of the plaintiff by the careless and negligent manner in which the said Manaster and the defendant excavated the earth on the lot adjoining that of the plaintiff. The plaintiff was the owner of a three-story brick building situated at No. 1050 North Ashland avenue, Chicago. Manaster was the owner of the adjoining lot, and he engaged the defendant to construct a building on the same. The defendant made an excavation on the lot for foundation and basement purposes. The plaintiff claims that the defendant did the excavating in a negligent and unskillful manner and thereby caused an injury to his building. The case was tried before the court and a jury, and a verdict was returned finding the defendant Manaster not guilty and the defendant Lipman guilty and assessing the plaintiff's damages at the sum of

$675. Judgment was entered upon the verdict and the defendant Lipman has prayed this appeal.

The defendant has assigned four grounds for the reversal of the judgment. One of these we think is meritorious. The court, at the instance of the plaintiff, gave to the jury the following instruction:

> "The court instructs the jury, as a matter of law, that the owner of land has a right to have the soil of his premises sustained by the lateral support of the natural soil of the adjoining land; and that while this right does not extend to the support of any additional weight which the owner of the soil may place upon it, such as a building, still the law is that the adjoining land owner in making excavations on his land must do so in a reasonably careful and skillful manner, so as to avoid doing any unnecessary injury to the building; and in this case, if you find from the preponderance of the evidence that the defendants made an excavation wholly within the lot owned by the defendant Kemaster, and that in making such excavations they failed to use reasonable and ordinary care or skill, as charged in the declaration, and that by reason of such failure of the defendants to use such reasonable care and skill, the building of the plaintiff was damaged, then your verdict should be for the plaintiff."

It will be noticed that this instruction, one that directs a verdict, is not drawn upon the theory that the defendants committed a trespass upon the land of the plaintiff, but upon the theory that the excavation was made wholly within the lot of the defendant Kemaster. By the instruction the jury are directed to return a verdict in favor of the plaintiff if they find that the defendant failed to use reasonable and ordinary skill in making the excavation, and that the plaintiff was thereby injured. The instruction entirely eliminates from the consideration of the jury the question as to whether or not the plaintiff exercised ordinary care for the protection of his

property, and whether such failure, on the part of the plaintiff, to exercise ordinary care, if the jury found the same was proven, proximately contributed to produce the injury in question. As the theory of the defendants was, that if it had not been for the negligent conduct of the plaintiff, the injury to his property would not have occurred, and as there was evidence tending to support this theory, the giving of the above instruction constitutes reversible error. The judgment of the Circuit Court of Cook County will be reversed and the cause remanded.

REVERSED AND REMANDED.

826 - 20964.

ELNVIE C. PAINTER, Appellant,	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
HOWARD DUNHAM, Appellee.	)	OF CHICAGO.

195 I.A. 468

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This was an action of the first class in the Municipal Court of Chicago, brought by the appellant (hereinafter called the plaintiff) against the appellee (hereinafter called the defendant) to recover a balance of $985.28, and interest, alleged to be due the plaintiff for services as a "graduate professional nurse," rendered to the defendant under an alleged contract. Plaintiff's statement of claim, as amended, alleges, in substance, that she rendered services to certain members of the defendant's family as a "graduate professional nurse," for a period of 51 weeks, from March 14, 1908, to and including October 19, 1909, (except two weeks, from July 25, 1908 to August 10, 1908) at an agreed rate of $25 per week: making a total of $1275; that the defendant was entitled to credit for payments aggregating $1049.72, leaving a balance due to plaintiff of $985.28, with interest. The defendant filed an affidavit of merits in which he denied the employment of the plaintiff for a longer period than 70 weeks; denied any contract or agreement with the plaintiff to pay her at the rate of $25 per week, or that he ever ratified any such alleged agreement; and averred that there was never any contract or agreement as to the rate of pay of the plaintiff; that she was entitled to payment only at a reasonable rate for the nature and kind of services performed; that plaintiff rendered services as a "graduate professional nurse" for 26 weeks only, and that for such services $25 per week is reasonable, making a total of $650; that

for the remaining [illegible] weeks plaintiff rendered services only as a practical or untrained nurse, for which [illegible] per week is reasonable and ample compensation, making a total of [illegible]; that plaintiff earned for her entire services to the defendant a sum not exceeding $1074; that defendant has paid to plaintiff $1039.74, leaving a balance of [illegible] due the plaintiff.

The case was tried by the court without a jury; the issues were found against the defendant and plaintiff's damages were assessed at [illegible]; judgment was entered accordingly and the plaintiff has prayed this appeal.

There is practically no dispute between the parties as to the material facts in this case. The real contention is as to the law applicable to the facts.

The plaintiff claims that during the full period of time covered by her statement of claim she was entitled to compensation from the defendant "at the agreed and customary rate of $25 per week." The defendant avers in his affidavit of defense that there never was any contract or agreement as to what rate he was to pay the plaintiff; that during the first [illegible] weeks of the period covered in the plaintiff's statement of claim she rendered services "as a graduate professional nurse," and that a rate of [illegible] per week is reasonable for such services; that for the remaining weeks of the said period she rendered services only "as a practical or untrained nurse," and that for such services a rate not exceeding [illegible] per week is reasonable and ample. It is admitted by the defendant that he employed the plaintiff as a "graduate professional nurse;" that he knew at the time of the said employment that the compensation for such services would be $25 per week; that the plaintiff rendered services to the defendant as a "graduate professional nurse" for a period of [illegible] weeks, and that he paid her [illegible] per week for said period.

Whether the plaintiff was paid $25 per week for the said period of 26 weeks by express understanding between the parties, it is entirely unnecessary to determine, for the reason that the defendant concedes that the plaintiff and himself, at the time of the hiring, and during the said 26 weeks, understood that the compensation of the plaintiff was to be $25 per week.

If the employment continued for the remaining period of time covered by the statement of claim and the character of the work rendered by the plaintiff was clearly within the scope of the kind rendered during the said 26 weeks, (even though it might have been of a slightly different character) and the defendant continued to receive the services of the plaintiff without giving her notice of any change in the compensation to be paid, the presumption is that the same wages paid for the said 26 weeks would continue. Crane Cree. & Co. v. Adams, 146 Ill. 1[illegible]; Ingalls v. Allen, 1[illegible] Ill. 170. The defendant contends that after the said 26 weeks of service the character of the services rendered by the plaintiff changed, and that she then performed the work of a "practical or untrained nurse," There is no evidence, in our judgment, upon which to base this contention of the defendant. While the duties of the plaintiff during the latter period may have been at times less exacting than formerly, nevertheless, it is clear, even from the defendant's evidence, that the plaintiff was expected at all times to hold herself in readiness to perform all the duties that might be required of her as a "graduate professional nurse," and there is no evidence tending to prove that at any time the plaintiff and defendant had any understanding that the character of the services to be rendered by the former were to be any different from those that she rendered during the said 26 weeks. There is no evidence tending to show that the plaintiff and the defendant at any time entered into any new arrangement as to the compensation that should be paid the plaintiff. The defendant did testify as follows: "that on the 9th or 10th of

May, 1906, Miss Painter rendered me a statement and asked for some money. I had been giving her money as she asked it during this time. The statement showed that I owed her at the rate of $25 a week a little over $1000. I wrote Miss Painter a check for $500. I told her I had no idea she would charge me $25 a week for every week she had been with me, that I thought it was unfair, that I could not afford to pay it, that I could not afford to keep her at that rate and that if she was going to stay with me any longer she would have to reduce her bill and reduce her charge for the future. That is the payment appearing on statement of claim under date of May 11, 1906. The Court: Q. What did she say when you told her she would have to reduce her bill? A. She said she didn't see how she could do it, etc., but I told her I could not afford to keep her any longer at that rate. It was a pleasant friendly conversation and we left it that way, that I could not afford to pay it." The defendant further testified that he never at any time during the period of employment told the plaintiff that he considered her as anything else than a professional nurse; that after the said conversation he permitted the plaintiff to continue in her work and nothing further was said or done in reference to her work or pay.

If, after notice by an employer of a proposed change in the terms of the employment, an employee continues in the service of the employer, and without objection, the law presumes that the employe assents to the new terms and thereafter performs services thereunder. However, in the present case, there is nothing in the aforesaid testimony of the defendant from which it could be presumed that the plaintiff assented to any terms of compensation different from the original rate of $25 per week, nor is there any evidence in the record from which it could be presumed that she, after the said conversation, worked under any new terms and conditions.

The plaintiff submitted the case to the court upon the theory that under the facts of the case the defendant hired the plaintiff and at a compensation or wage of $25 per week, and that she was entitled to receive this sum per week for the entire period covered by the statement of claim. The defendant submitted the case to the trial court upon the theory that there was no agreement between the parties as to the rate of compensation at the time of the employment of the plaintiff by the defendant, or at any other time, and that the measure of the compensation to be paid the plaintiff was to be determined according to the quantum meruit, or the reasonable value of the services performed; that the reasonable value of the said services for 38 weeks was $25 per week, and the reasonable value of the services after that time was $6 per week. The trial court adopted the theory of the defendant and entered judgment in favor of the plaintiff for $4.38. In this he erred. In our judgment, under the admitted facts of the case, and under the law, the plaintiff's theory was the correct one, and should have been followed by the court. This case must therefore be reversed, but as it is certain from the proof that the amount the plaintiff is entitled to is $[illegible].21, and as a jury was waived in the present case, it will not be remanded, but judgment will be entered here in this court in favor of the plaintiff (appellant) and against the defendant (appellee) for the sum of $[illegible] and costs of the suit.

JUDGMENT REVERSED AND JUDGMENT HERE FOR $[illegible].21 AND COSTS OF THE SUIT.

651 - 20969.

HERMAN COHN, Appellee,	)	APPELLATE COURT
vs.	)	SUPERIOR COURT
FLANAGAN and SIEDENWEG COMPANY, a corporation, Appellant.	)	COOK COUNTY.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The appellee, Herman Cohn, (hereinafter called the plaintiff) sued the appellant, Flanagan and Siedenweg Company, a corporation, (hereinafter called the defendant) before a justice of the peace of Cook County, Illinois, and the defendant gave notice of set-off. The justice found for the defendant and awarded it damages in the sum of one cent; judgment was entered on the finding and the defendant took an appeal to the Superior Court of Cook County, and on the trial there, before the court and a jury, a verdict was rendered for the plaintiff for $115. Judgment was entered on the verdict and this appeal followed. The plaintiff has not filed an appearance in this court.

The defendant contracted with St. John's Church in Jacksonville, Florida, to furnish the windows for its church, and it then entered into the following contract with the plaintiff:

"THE FLANAGAN & SIEDENWEG COMPANY.
ARTISTS - STAINED GLASS.
CHICAGO, March 2, 1926.

We, The Flanagan & Siedenweg Co., agree to pay to Herman Cohn two hundred Dollars ($200.00), for setting all of the glass in St. John's Church at Jacksonville, Fla., as per plans and specifications.

He, Herman Cohn is to furnish all the necessary material excepting glass and lead, and to place same in position, including sixty seven ventilators to the satisfaction of the committee. The work to be set in stone.

He is to use cement of the best quality obtainable in Jacksonville and the best grade of putty, if putty is selected by the committee and all work to be left clean and to the satisfaction of the church committee.

We, the Flanagan & Siedenweg Co. to be in no way held responsible for any expenses in the delay or shipment by the Railroad Company.

(Corporate Seal) THE FLANAGAN & SIEDENWEG CO.
Joseph E. Flanagan, President (Sign)
Herman Cohn (Sign)"

The plaintiff went to Jacksonville in March, 1906, and began work under the contract. On March 13th, after the plaintiff had completed about one-third of the work, the committee of the said church complained that a certain portion of the glass then on the grounds was too dark in color and, according to the plaintiff, ordered him not to use the same. The plaintiff immediately telegraphed the defendant as follows: "Dark glass rejected, send other, can't wait. Coming back." The next morning he received the following telegram from the defendant: "Glass made special at factory from their sample, is correct. Don't come back unless at your own cost till further orders. Letter follows." On March 15, 1906, the plaintiff received from the defendant the following letter:

"March 13, 1906.

Mr. H. Cohn,
c/o Bond & Bours Co.,
Jacksonville, Fla.

Dear Sir:-

We received your telegram at 4:40 P.M. this day the 13th as follows: 'Dark glass rejected send other cant wait--coming back' and we wired you as follows: 'Glass made special at factory from their sample is correct. Don't come back unless at your own cost till further orders. Letter follows.' We also telegraphed Bond and Bours Co. as follows: 'Cohn telegraphed glass rejected. Too dark. Glass made from your sample at factory. Glass O.K. Cannot accept rejection on that ground. Letter follows.'

"You have no authority to take it upon yourself to say anything about the glass being rejected. You are only there for the purpose of setting the glass and if there is anything of this kind to be said it must come from the people who are buying the goods. We cannot regard you but as a hired man setting the work, therefore, you should not take the responsibility of sending the telegram.

"We wish to state that this glass was made special for this job from a sample received from Bond & Bours Co., Jacksonville, Fla. and was sent to the Pittsburgh Plate Glass Co. at Chicago who reserved the sample and it was sent in to the factory to be made after sample, the glass was made after same and is the same commercial number as known throughout the U.S. and it is the same as sample now furnished for the windows in St. John's Church, Jacksonville, Fla. I am enclosing herewith a small piece taken from the sample which I shall use for reference showing the small piece of the glass that may be compared with their sample.

"The only difference there might be is the question of thickness. We have compared it with our sample and find it O.K. also compared it with the Pittsburgh Plate Glass Co's sample and find it O.K. There must be some mistake. But it is well known that when cathedral glass is leaded in flat lead that the flat lead has the effect of giving it a darker appearance and it is darker in appearance in large sheets than it is in small sheets.

"We do not propose to accept a rejection on technicalities, furthermore, we will not stand any expense of your returning unless the officials at Jacksonville give satisfactory reasons and refuses to allow you to set the work in place in writing, this will give us an opportunity for action, but do not take any verbal reasons for stopping this order, it must be in writing and in such clear language that there will be no question on your part about returning to Chicago. We hold that we have fulfilled our contract and the responsibility will have to develop on the other end as to rejection.

Very truly yours,
The Flanagan & Biedenweg Co."

Immediately upon the receipt of this letter the plaintiff returned to Chicago, arriving there on March 17th. When he left Jacksonville, all the material necessary to complete the job to the satisfaction of the church people, was on the ground; telegrams and letters had passed between the defendant and the church people, and the trouble in reference to the color of the glass was settled at once, and the church people requested the plaintiff to remain and finish the work. The plaintiff admitted that he knew that the defendant was financially responsible and well able to pay any damage that he might suffer by reason of the delay. When the plaintiff left Jacksonville, the defendant immediately sent an employe to complete the work covered by the contract with the plaintiff: this employe arrived in Jacksonville on March 17, 1906; found all the material necessary to complete the work on the ground and the work was completed under his supervision. The defendant claimed that the work done by the plaintiff was very unsatisfactory, and that it expended, altogether, $[illegible].19 in completing the work the plaintiff had contracted to perform, and that after allowing the plaintiff the amount of his contract, $[illegible], there was a balance due the defendant of $[illegible].19.

After a careful consideration of the evidence in this case, we are satisfied that the judgment must be reversed and the cause remanded, for the reason that it is clearly apparent from the proof that the plaintiff, without just cause, abandoned his contract. The glass objected to by the church authorities constituted only a small proportion of the total used in the work. There is nothing in the record

from which we can actually determine whether the objection to the glass was well founded or not, but in any event, the defendant quickly satisfied the church officials and immediately shipped glass that was afterwards used, without objection, in the work. This glass arrived in Jacksonville before the plaintiff's departure, or within a few hours thereafter. Even if the plaintiff were compelled to remain idle for two or three days because of the trouble in reference to the glass, this fact, alone, would not justify him, under all the circumstances in this case, in abandoning the work, nor does it appear that it was really necessary for him to remain idle at all, for there was work on his contract that he might have done during that time. If the plaintiff suffered a delay in his work through the fault of the defendant, the latter would have been compelled, under the contract, to compensate him for the same. That the plaintiff was anxious, for some reason, to abandon the work is strongly evidenced by the fact that as soon as the church people made the complaint in reference to a portion of the glass, the plaintiff telegraphed the defendant: "Dark glass rejected, send other, can't wait. Coming back."

In Gillespie v. Gillespie, 249 Ill. [illegible], the court said:

> "A slight or partial neglect on the part of one of the parties to a contract to observe some of the terms or conditions thereof, will not justify the other party to at once abandon the agreement. As was said in Selby v. Hutchinson, 4 Gilm. 319, in order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and noncompliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself."

See also City of Elgin v. Joslyn, 136 id. 525.

The judgment of the Superior Court of Cook County will be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]

[illegible] Bank of Chicago, et al.,
appellees,

vs.

[illegible], et al.

on appeal of [illegible] Deceased of
PARK COLLEGE, (Corporation).

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

195 I.A. 496

MR. PRESIDING JUSTICE [illegible] delivered the opinion of the court.

The State Bank of Chicago as trustee of the trust created by the last will and testament of John M. Parsons, deceased, filed its bill in the superior Court of Cook County, Illinois, to foreclose a trust deed given by John Christensen and Rosalba A., his wife, to secure the payment of their promissory note for $500. Cross-bills were filed by Kathryn Crispe, John Christensen and Park College. The chancellor dismissed the original bill and the cross-bill of Park College. Park College has appealed and the State Bank of Chicago has assigned cross-errors.

In the fall of 1907, appellee John Christensen, secured a loan of $200 from Arthur [illegible]. Pease, and gave his note, dated November 20, 1907, for the amount; the note was secured by a trust deed on the home of Christensen at [illegible] Scott Street, Chicago. Pease afterwards sold the note and trust deed to a man named Griffin, who in turn sold it to the Thompson Taylor Spice Company, and the note and trust deed was owned by the Thompson Taylor Spice Company on the date of its maturity. Upon the maturity of this note, appellee Christensen again applied to Pease to secure for him a loan of $[illegible] on his said property; the said $[illegible] note to be paid out of the $500 loan and the remainder of the same to be turned over to Christensen. ~~xxxxxxxxxxxx~~ Christensen secured the loan of $[illegible] from appellee Kathryn Crispe, through Pease. Christensen gave his note for $[illegible], secured by a trust deed on his said property, signed by himself and

wife. This loan of $800 was made with the understanding between the three parties that the said $800 note was to be paid out of the $800 loan, and that the note and trust deed given by Christensen to secure the loan of $800 was to become a first lien on his property. On December 15, 1903, Pease paid for and took up this $800 note and trust deed from Thompson & Taylor Spice Company, but he never released the trust deed securing the note, and he kept the note and trust deed in his possession; he also kept in his possession the $800 note and trust deed securing the same. On or about March 15, 1891, Caroline T. Parsons, who was then acting as the sole executrix of the last will and testament of John R. Parsons, deceased, died testate, and Walter M. Howland qualified and entered upon his duties as executor under her will. Howland received with the assets of the Caroline T. Parsons estate the assets of the John R. Parsons estate, and he thereafter acted as trustee of both estates. On March 24, 1902, Howland was relieved as trustee of said estates and Pease was appointed trustee of the same. The trust created by the last will and testament of Caroline T. Parsons, deceased, provided that the income of certain property should be paid to one Alice . Babcock during her life, and upon her death the said trust property should go to appellant Park College. The will further provided that if for any reason, the gift to Park College failed, the said property should go to the children of Alice T. Babcock. During the lifetime of Alice . Babcock, at the request of Park College, and with the consent of Alice . Babcock, Pease accelerated the trust and turned over to the said College certain cash and securities claimed by Pease to be the corpus of the Caroline T. Parsons trust fund. Among the securities and cash so delivered to the said College was the $800 Christensen note, with interest coupons, and trust deed securing the same. Pease remained trustee of the John R. Parsons estate until his death, April 7, 1911, when the appellant State Bank was appointed

trustee of the said estate, and obtained from Pease's executrix possession of the $800 Christensen note and trust deed securing the same. The bill filed by the State Bank of Chicago was for the purpose of foreclosing the trust deed and securing payment of the $800 note. The chancellor dismissed the bill of the State Bank of Chicago for want of equity, and his action in this regard is urged as error by the said bank.

The cross-bill and answers filled by the said Park College and Kathryn Griggs present the question as to the ownership of the $800 Christensen note and trust deed above referred to: the College claiming to be a holder of the same in due course. The court found the issues on this question in favor of Kathryn Griggs and against Park College, and dismissed the cross-bill of the latter for want of equity. This appeal and prayer of the College to reverse the decree dismissing its cross-bill and finding the property in said $800 note to be in Katerynn Griggs.

The State Bank of Chicago contends that the chancellor erred in dismissing its bill for want of equity. The certificate of evidence in the case appears to have been tendered by the appellant, Park College, and in the judge's certificate to the same, it is stated, "that the foregoing was all the evidence introduced on the hearing of said cause, on the issues as to the ownership of the $800 note and its coupons and the trust deed securing the same." From this certificate, it must appear that the evidence heard on the issues made between the bank and Christensen on the original bill is not included in the certificate of evidence. The appellant bank is, therefore, not in a position to question the action of the chancellor in dismissing its bill. "In chancery cases the rule is, that a decree granting relief must be supported by a finding of specific facts in the decree itself, or by evidence appearing in the record: but the rule is otherwise as to a decree dismissing a

bill of complaint, since that is the proper decree to be entered in case there is no evidence, or in case the evidence is insufficient to warrant the court in granting the relief prayed for. Such a decree cannot be reversed because the relief was denied, unless complainant shall show that the evidence was such as to entitle him to the relief asked for. Such showing must be made either by a certificate of evidence, or by a certificate showing that the record filed is complete. In the absence of such showing, it will be presumed that there was evidence which justified the action of the court in dismissing the bill." Reimen v. Strassheim, 176 Ill. App. 13. "In this case no affirmative relief was given by the decree, but it merely dismissed complainants' bill for want of equity. Such a decree is authorized wherever the evidence is insufficient to warrant the relief asked for. (Ryan v. Sanford, 145 Ill. 281: Jackson v. Sackett, 148 id. 148; First National Bank v. Baker, supra.) A complainant aggrieved by such a decree must show that the evidence entitled him to the relief for which he prayed, and to do this he must preserve the whole of the evidence." Kelly v. Funkhouser, 171 Ill. 395. To the same effect is Bowman v. Hickelberry, 146 Ill. 117.

Counsel for the Bank admit the rule referred to in the foregoing cases, but they insist that it does not apply in the present instance, for the reason "that counsel (for appellee Christensen) were not content with a decree dismissing the bill of the State Bank of Chicago as trustee for want of equity, but that they have caused the court to incorporate in the decree conclusions of law and fact as follows:

> 'That the $800 note and mortgage executed by Christensen on the 20th day of November, 1907, to Arthur Dense, trustee, was fully paid by the said Christensens, and that the complainant, the State Bank of Chicago, as trustee, has no right, title or interest therein.'"

And the counsel for the Bank argue that because of the incorporation

of the said "conclusions of law and fact" in the decree, it was the duty of the appellee Christensen or some party to the cause, other than the appellant bank, "to preserve in the record in some way the evidence which authorized the court to draw the conclusions which it did draw and incorporate in its decree. We admit that there is no such evidence in the record, and that for that reason the decree of the chancellor must be reversed." Under the decisions to which we have referred it was entirely unnecessary for the appellee Christensen to incorporate in the decree any finding of facts, and whether the part of the decree that the bank relies upon in support of its present contention is a finding of facts or "conclusions of law and fact," the incorporation of the same in the decree does not relieve the bank from the burden of showing that the action of the chancellor in dismissing its bill for want of equity was not warranted by the proof in the case, and as it has failed to file a proper certificate of evidence, it is impossible for it to successfully carry this burden.

The appellant, Park College, contends that it "is a holder in due course of the $500 note of John and Rosalba Christensen, and took the same, together with the trust deed securing it, free of any claim of Kathryn Crispe." The chancellor found in the decree not only that Kathryn Crispe was the owner of the said note, interest coupons and trust deed securing the same, but he further found that the said note, etc., were fraudulently delivered by Pease to the appellant College: that no consideration was paid for the said note, etc., by the said College: that settlement of the Parsons trust was enforced against Pease by the College, and that the College did not take the said note, etc., in good faith, and for value in the ordinary course of business, and that it acquired no right, title or interest therein. We have very carefully examined the evidence in this case, and we are fully satisfied that the said findings of the chancellor were clearly justified by the proof. Under the facts

and the law, the chancellor could not have found in favor of the College and against the appellee Grimes.

The decree of the Superior Court of Cook County is in all respects affirmed.

AFFIRMED.

[illegible] J. LYLE, appellee,	)	APPEAL FROM
	)	
vs.	)	Cook County.
	)	
Austin J. [illegible], Jr., appellant.	)	[illegible] Judge.

MR. PRESIDING JUSTICE [illegible] delivered the opinion of the court.

On March 3, 1915, judgment was entered in the County Court of Cook County for $150 against the appellant, Austin J. [illegible], Jr., and in favor of the appellee, [illegible] Lyle. On the same date an appeal was prayed and allowed upon the appellant filing an appeal bond in the sum of $250 within thirty days. On April 3, 1915, the following order was entered by the said court: "Now on this day, it is ordered by the court that the time to file appeal bond in the said cause be and is hereby extended ten days from April 3, 1915." On the same date (April 3, 1915), an appeal bond was filed by the appellant and approved by the court.

The appellee has filed a motion in this court to dismiss the present appeal on the grounds, "that the appeal bond filed in the court below was not filed within the time limited by the court, nor within the time fixed by a valid extension made by the court below." It is clear that this motion must be allowed. Jurisdiction by the trial court over its order fixing the conditions of an appeal is retained only until the expiration of the time fixed, and if this time expires without an extension before the appeal bond is filed, the right of appeal is lost. Hill v. City of Chicago, 218 Ill. 170.

[illegible]

[illegible]

sealed the

A further contention of the defendant is that the plaintiff was not totally disabled as found by the [illegible], and in support of this contention, reliance is placed upon the case of [illegible] [illegible] Knights of [illegible] v. [illegible], [illegible] Ill. App. [illegible]. In that case, [illegible] a number of the [illegible] from the four fingers of one hand [illegible] working at [illegible]. It was held that this was not a total disability. Total disability, as used in the case at bar, does not mean absolute physical disability to perform any kind of work. ([illegible] v. [illegible] of America, [illegible] Ill. App. [illegible].) The contention is without merit.

The defendant's main contention, however, is that at the time of the injury the plaintiff was not a member in good standing for the reason that he had theretofore been suspended for non-payment of the [illegible] dues. [illegible] did not receive the dues from the [illegible] of [illegible], and that the plaintiff had been [illegible] by [illegible]. The plaintiff, however, contends that he was improperly suspended for the reason that [illegible] went into all the facts and circumstances bearing upon the question of the validity of the alleged [illegible] and [illegible] of the defendant [illegible] by the plaintiff or the defendant [illegible]. The [illegible] of the [illegible], in our opinion, [illegible] conclusions.

The judgment of the [illegible] Court [illegible] reversed and the cause remanded [illegible].

80 - 20401.

JOSIAH CHARTZ, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
[illegible], Plaintiff in Error.	)	OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The writ of error in this case was sued out to review a judgment of the Municipal Court for [illegible].00 entered in favor of the defendant in error, hereinafter called the plaintiff, and against the plaintiff in error, hereinafter called the defendant. Plaintiff is an attorney at law, and was retained by the defendant to represent him in certain litigation then pending in the Superior Court of Cook County. It was agreed that plaintiff should receive $5 per hour for the time necessarily employed. January [illegible], 1912, a memorandum of the agreement was signed by the defendant, which stated that $100 had been paid as a retainer, and that the fees earned should be "paid as fast as can be, and secured on Tucker's estate." In accordance with the agreement, plaintiff proceeded to represent the defendant in the case in the Superior Court, and continued to do so until sometime in July, 1912. At that time plaintiff claimed he had been necessarily engaged 127 1/2 hours in the litigation, and requested that the defendant secure him for his fees before proceeding further. At the time of the request, the amount of his services rendered had not been computed. Plaintiff requested that he be secured on the interest which the defendant had in the property involved in the case in the Superior Court: the security to cover the services rendered and to be rendered. The defendant refused to do so, stating that as he did not know the amount of plaintiff's bill, he was unwilling to give the security. Thereupon plaintiff said he would have nothing further to do with the case.

Suit was brought for the balance claimed by the plaintiff, amounting to $540.80. The case was tried before the court and jury, and a verdict of $[illegible].60 returned in favor of the plaintiff. A new trial was granted to the defendant. The case was again tried before the court and jury, and a verdict returned for $[illegible].40 in favor of the plaintiff, on which the court entered judgment.

No complaint is made to the rulings of the court in the admission or rejection of evidence, nor is there any complaint made to the instructions given to the jury, except that the court should have given a peremptory instruction for the defendant. The defendant made a motion at the close of the plaintiff's evidence to instruct the jury to find for the defendant, which the court overruled. It was not afterwards renewed at the close of all the evidence, and is, therefore, waived. (Lanman v. Knox Fire Escape Co., [illegible] Ill. [illegible].)

The defendant further contends that the judgment is against the law and the evidence; the contention being that as plaintiff withdrew from the case in the Superior Court before the termination of the same, he is not entitled to recover, as it was the agreement between the parties that the plaintiff was not to be paid until the termination of the suit. This contention is denied by the plaintiff, and presented a question of fact for the jury. Two juries have found against the defendant. Therefore, this court should not set aside the judgment unless it is clearly and manifestly against the weight of the evidence. The witness appeared in open court and testified before the court and jury, and the finding was against the defendant. It has long been the settled law in this State that such a finding will not be set aside in a court of review unless it is manifestly against the weight of the evidence. (Schulgen v. West St. Louis [illegible] Co., [illegible] Ill. [illegible].)

We have carefully gone over the evidence and see no ground why the judgment should be disturbed. The judgment of the Municipal Court is correct and will be affirmed.

AFFIRMED.

1[illegible] - [illegible].

H. BAGS,
Defendant in Error,

vs.

ERIE RAILROAD COMPANY,
a Corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 508

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The writ of error in this case seeks to have reversed a judgment for $400 rendered by the Municipal Court. The judgment was in favor of defendant in error, hereinafter called the plaintiff, and against the plaintiff in error, hereinafter called the defendant.

In 1911, plaintiff, who was a resident of Passaic, New Jersey, was moving to Chicago, Illinois. The evidence tends to show that the plaintiff took his household goods to the freight depot of the defendant, located in New Jersey, on September 4, 1911. That being Labor Day, no goods were being received. The plaintiff then took them and delivered them to an expressman, to be by the latter taken to the defendant the next day for shipment to Chicago. The defendant and his family left for Chicago on September 4th. The next day, the expressman delivered the goods to the railroad company. He paid the freight - $6.00 - received a bill of lading, and mailed the same to the plaintiff in Chicago. The articles were household goods, one item was "11 case contents." All of the goods weighed 800 pounds. Stamped on the bill of lading in red ink by the agent in New Jersey was the following:

> "For the purpose of enabling the carrier to apply the proper published rate, as explained in its Classification and Tariffs, I hereby declare that the value of the property herein described does not exceed $10.00 per 100, and that in case of loss or damage thereto, I will not assert claim against the carrier on a higher basis of value than $10.00 for each 100 pounds or fraction thereof in weight of the property so lost or damaged." (This was signed by plaintiff's agent.)

When the goods arrived in Chicago, plaintiff was notified and he received all of his property except one case of goods which the plaintiff testified consisted of curtains, silk, embroidery, etc. Suit was brought August 14, 1917, for $400, being the value which plaintiff placed on the goods that were lost. The court entered judgment for $400 in favor of the plaintiff and against the defendant, being the full value of the goods lost, as found by the court.

Numerous errors are complained of in reference to the ruling of the court on the admissibility of evidence and on the propositions of law submitted. The court refused to hold, as a proposition of law, that the matter involved in the case was interstate commerce, and that the liability of the defendant was to be determined exclusively under the act of Congress of February 4, 1887, as amended. This was error. (Adams Express Co. v. Croninger, 226 U.S. 491; Co., Chas. & Ohio. Ry. v. Harrison, 237 U.S. 657; Ellinger v. Cleveland, C., C. & St. L. Ry. Co., 184 Ill. App. 202.)

In the Croninger case, supra, it was expressly held that Congress had assumed exclusive jurisdiction in matters touching interstate commerce. The court there said, (p. 505):

> "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it."

Defendant offered in evidence a copy of its schedules of rates which it had filed with the Interstate Commerce Commission. They were certified by the secretary of said commission. The court ruled this inadmissible. From these schedules it appears that there were two rates, known as "First Class" and "First Class and a Half." On household goods sent from New Jersey to Chicago, the first rate was 75 cents per 100 pounds. The second rate was $1.12 1/2 per 100

pounds. Section 15 of the Interstate Commerce Act makes copies of the schedules such as the one offered, competent evidence, and the court should have admitted it.

The defendant contends that as the schedules above mentioned provide that any claim for loss such as the one at bar must be made within four months after a reasonable time for the delivery of the goods has elapsed, and as the suit was not commenced until about fifteen months after the goods were lo t, the suit cannot be maintained. This defense was not made in the court below, and was therefore waived. A point cannot be made for the first time in a court of review.

The bill of lading in this case expressly limited plaintiff's claim in case of loss to $10 per hundred-weight. This agreement is valid and binding. (Kansas So. Ry. v. Carl, 227 U. S. 639; Wells Fargo & Co., v. Neimann-Marcus Co., [illegible]; Adams Express Co. v. Croninger, supra; St. Louis & San. Fran. Ry. Co. v. Harriman, supra; Clingan v. Cleveland, C., C. & St. L. Ry. Co., supra; Donohoo Horse & Mule Co. v. Missouri, K. & T. Ry. Co., 149 Pac. 453; Boston & Maine Rd. v. Hooker, 233 U.S. 97; Inman & Co. v. Seaboard Air Line Ry. Co., 159 Fed. 980.)

The Carl case, supra, was an action brought by the holder of a bill of lading for the loss of "household goods." The defense was that Carl, in order to get the lower of two rates, agreed that in case of loss, the goods should be valued at $5 per hundred-weight. Suit was brought before a justice of the peace to recover the value of the contents of a box which had not been delivered. There was a judgment for the full value of the goods lost, - $75. An appeal was taken, and the judgment was finally affirmed by the Supreme Court of Arkansas. There were two rates upon household goods: one based upon a "released valuation" of $5 per hundred-weight; i.e., the shipper, in consideration of the lower rate, released the railroad company from all liability from any loss or damage the property might sustain,

in excess of $5 per hundred-weight. The higher rate was 79 cents more per hundred-weight, and in case of loss or damage, the shipper could recover the full amount of the loss. These rates were evidenced by tariffs filed with the Interstate Commerce Commission. The court, in considering the act of Congress of June 29, 1906, said, (p. 542):

> "That provision * * * does not forbid a limitation of liability in case of loss or damage to a valuation agreed upon for the purpose of determining which of two alternative lawful rates shall apply to a particular shipment.
>
> "But it is said that upon the fact of the contract of limitation here involved, it is an exemption from liability for negligence forbidden by the Carmack Amendment.
>
> (p. 550) "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. * * * A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemption from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law. * * *
>
> "It follows, therefore, that when the carrier has filed rate-sheets which show two rates based upon valuation upon a particular class of traffic, that it is legally bound to apply that rate which corresponds to the valuation. If the shipper desires the lower rate, he should disclose the valuation, for in the absence of knowledge the carrier has a right to assume that the higher of the rates based upon value applies. In no other way can it protect itself in its right to be compensated in proportion to its insurance risk. But when a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount.
>
> (p.552) "The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied, must be conclusive in an action to recover for loss or damage a greater sum.
>
> (p.555) "Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. * * * Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate.
>
> (p.556) "The defendant in error must be presumed to have known that he was obtaining a rate based upon a valuation of five dollars per hundred-weight, as provided by the published tariff. This valuation was conclusive, and no evidence tending to show an undervaluation was admissible."

The court there held that the amount of recovery specified in the bill of lading was binding, and reversed the Arkansas court.

To the same effect is the case of Donohoo Horse & Mule Co., supra. There, a horse was being shipped from Kansas to Tennessee, and

was killed. At the time the accident occurred, an agent of the company agreed to pay $225. Later, the exact value of the horse was found to be $175.50, which the agent of the company agreed to pay. Payment not having been made, suit was brought, and judgment was entered for the latter amount. The contract under which the shipment was made recited that the company had two rates on live stock. The rate charged for the horse in question was less than a certain published rate, and it was agreed that, in consideration of this rate, in case of loss or injury, the liability of the railroad should not exceed $100. The court held that recovery could not be had for more than $100, and that under the Interstate Commerce Act, it would be illegal to pay more than this amount even by agreement of the parties, as it would constitute an unlawful discrimination.

The Clingan case, supra, was an action brought to recover for the loss of a race horse shipped from Indiana to Illinois. The contract there limited the liability of the railroad company to $100, and the plaintiff recovered $1200, the value of the horse. The court said that under the provisions of the Federal law, the shipper was conclusively presumed to know the terms of the bill of lading and the published tariffs filed with the Interstate Commerce Commission. It was held that the maximum amount which Clingan could recover was $100.

In the case at bar, the evidence does not disclose the weight of the goods which are said to have been lost. The proof that the goods in question were delivered to the railroad company in New Jersey is not clearly established. To hold that any recovery in this case must be limited to $10 per hundred-weight for the goods lost.

In the view we take of the case, it will be unnecessary to discuss other questions argued.

The judgment of the Municipal Court will be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion.

R. Walker and R. McDed.

405 - 20733.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	ERROR TO
vs.	)	COUNTY COURT
WESTERN ELECTRIC COMPANY, a Corporation, Plaintiff in Error.	)	COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

July 22, 1914, judgment was entered by the County Court of Cook County, imposing a fine against the plaintiff in error for $150. A writ of error was sued out from this court to review the record.

June 27, 1914, leave was granted the State's Attorney to file an information, which set up that the plaintiff in error, a corporation, failed, refused and neglected to make out and file a schedule of its personal property owned or controlled by it on May 1, 1914. Summons was issued June 29, returnable July 6, and served on the defendant July 1. No appearance was entered by the plaintiff in error, and on July 22, 1914, it was defaulted and the fine imposed.

The plaintiff in error contends (1) that the summons being returnable less than ten days from the date of its issuance, and not returnable to any term of court, is void, and the court was without jurisdiction; (2) that the proceeding being criminal, it must be prosecuted by the County Attorney; (3) that the County Court of Cook County has no jurisdiction of criminal matters; and (4) that the part of section 24 of the laws of 1872, as amended, which made the failure to file a schedule of property a misdemeanor, was omitted from the act of 1898 providing for the assessment of property, and is therefore repealed.

In the view we take of this matter, it will be necessary to decide only the fourth of the above contentions.

Section 24 of the Revenue Act of 1872, as amended, provides that persons required to list personal property, shall make out under oath, and deliver to the assessor, a schedule of all personal property in their possession or under their control: that the assessor shall fix the fair cash value as of the 1st of May: that if the person refuse to make such schedule, then the assessor shall do so according to his best judgment, and "shall add to the valuation of such list an amount equal to fifty per cent of such valuation, and if any person making such schedule shall swear falsely he shall be guilty of perjury and punished accordingly. Any person so required to list personal property who shall refuse, neglect or fail when requested by the proper assessor, so to do, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not exceeding two hundred dollars."

The above mentioned law is entitled, "An Act for the assessment of property and for the levy and collection of taxes."

In 1898 the legislature passed an act entitled, "An Act for the assessment of property, and providing means therefor, and to repeal a certain act therein named."

Several sections of the Act of 1898 provide that the value of the property shall be fixed as of April 1st, and that schedules of personal property be made and filed. Section 19 provides: "The assessor shall require every person to make, sign, and swear to the schedule provided for by this act. If any person shall refuse to make the schedule herein required, or to subscribe and swear to the same, the assessor shall list the property of such person according to his best knowledge, information and judgment, at its fair cash value, and shall add to the valuation of such list an amount equal to fifty per cent. of such valuation.

"Whoever in making such schedule shall wilfully swear falsely in any material matter shall be guilty of perjury and punished accordingly."

It will be noted that the Act of 1872 provides for the assessment and collection of taxes, while the Act of 1898 provides only for the assessment. The Act of 1898 did not, in terms, repeal any particular section of the Act of 1872, but only repealed an "act for the election of assessors in certain townships," etc.

It is contended on behalf of the People, that the Act of 1898 did not repeal that portion of section 24 of the Act of 1872, supra, which made a failure to file a schedule a misdemeanor, and that, therefore, the fine was properly imposed in this case: the argument being that this was retained by section 35 of the Act of 1898, which provides that "All the provisions of the general revenue law in force prior to the taking effect of this act shall remain in force and be applicable to the assessment of property and collection of taxes except in so far as by this act is otherwise expressly provided."

In the case of People v. Knopf, 183 Ill. 410, the court, in construing the Act of 1898, supra, held that it was an independent act in itself, and provided a new scheme for the assessment of property. The court there said, (p. 417): "The act of 1898, however, provides for an entire new system of making the assessment, and the basis of it, with new modes of procedure and a new system of review, and as to that subject it is substantially complete in itself, constituting an entire plan for the making of the assessment."

In the case of People v. Town of Thornton, 186 Ill. 162, it is said, (p. 172):

> "It is a well settled principle of statutory construction, that a subsequent statute which revises the whole subject of a former one, and is intended as a substitute for it, operates as a repeal of the former, although it contains no express words to that effect. (Culver v. Third Nat. Bank of Chicago, 34 Ill. 628; Andrews v. People, 75 id. 605; Devine v. Comrs. of Cook County, 84 id. 590; People v. Board of Education, 166 id. 388.) The rule, thus announced, is applicable even when the provisions of a prior law are contained in a special act. (Andrews v. People, supra; People v. Board of Education, supra.) There now [illegible]

ute upon a certain subject matter, and the legislative intention appears from the latter statute to be to frame a new scheme in relation to such subject matter and make a revision of the whole subject, there is in effect a legislative declaration, that whatever is embraced in the new statute shall prevail, and that whatever is excluded is discarded."

To the same effect is Ellis v. Paige, 1 Pick. (Mass.) 43, where it is said, (p. 45):

"It is a well settled rule, that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the Legislature gross carelessness or ignorance, which is altogether inadmissible."

In Pirie v. Chicago Title & Trust Co., 182 U. S. 438, in construing the present act of 1898 on bankruptcy with reference to creditors receiving preferences, the court referred to a similar provision in the bankruptcy act of 1867, stating that Congress, in passing the present act, had left out certain provisions of the Act of 1867. The court there said, (p. 448):

"The words [illegible] are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued usually its words are, and an omission of the words implied an omission of the purpose."

We are of the opinion that the provision of section 24 of the Act of 1872, supra, which makes a person who fails to file a schedule guilty of a misdemeanor and subject to fine, has been repealed by section 19 of the Act of 1898, supra. Branch "A" of the Appellate Court of this district passed upon a similar proposition in the case of People v. Centaur Motor Co. of Illinois, No. 20795, opinion filed April 26, 1915. It was there held that this misdemeanor clause of section 24, supra, was repealed. There being no law to sustain the judgment of the County Court, it will be reversed.

REVERSED.

20871

538 - 20871.

ERNST R. LEHMANN, Appellant,	APPEAL FROM
vs.	CIRCUIT COURT,
WESLEY SHIMEALL and JOHN W. DORGAN, Appellees.	COOK COUNTY.

195 I.A. 511

STATEMENT BY THE COURT. This is an appeal from a decree of the Circuit Court of Cook County, dissolving a preliminary injunction and dismissing the bill for want of equity.

July 22, 1913, appellant filed his verified bill of complaint which alleged, in substance, that he was indebted to various persons in large sums of money; that his creditors were pressing him for payment and threatening suit; that having no funds with which to pay the debts, he applied to appellee Shimeall for money with which to pay his creditors; that Shimeall agreed to loan appellant certain sums of money provided appellant would give him judgment notes for double the amount; that the notes should contain provisions for attorney's fees in case judgment was confessed; that on divers times between September 5, 1912, and September 16, 1913, appellant executed about twenty-six judgment notes aggregating approximately $55,000; that at the execution of each note, appellant received a check from Shimeall for one-half of the amount of the face of the note, and was required by Shimeall to execute a receipt for the other half; that subsequently to the making of the several notes, Shimeall pretended to have sold one-half of the notes to appellee Dorgan; that the notes were placed in the hands of Attorney Jonas O. Hoover for the purpose of having

of equity.

judgment entered thereon; that appellees threatened that unless the notes were paid, judgment by confession would be entered, (including attorney's fees as provided in the notes which aggregated the sum of $2, 800); that Shimeall was, in fact, the owner of all of the notes, and that the assignment of one-half of them to Dorgan was a mere pretense to enable Shimeall to collect the face of the notes. Appellant further avers that he "is now ready and willing and hereby offers to pay whatever amount the court finds due upon said notes;" that appellees threatened to confess judgment and would do so unless restrained by writ of injunction. The prayer is that the defendants be enjoined and restrained from confessing or entering judgment on the notes, and for general relief.

A temporary injunction as prayed for was issued without notice upon the filing of the bill. Appellant was required by the court to file a bond in the sum of $200. July 23, the defendants entered their appearance, and on July 26, on motion of appellees to dissolve the injunction, it was ordered that appellant pay into court $26,575, together with interest amounting to $1,164.03, the first sum being one-half of the face of the notes. Appellant was also ordered to file and execute his bond in the sum of $50,000, conditioned to pay any additional sum that might thereafter be found due to the appellees or either of them. It was further ordered that appellees give bond in the sum of $3,000, conditioned to repay the complainant the amount of interest above mentioned in the event that upon final hearing it should be found that appellees were not entitled to such interest, and that the notes in suit be impounded by the court until further order. Thereupon appellant paid

the amount of the principal and interest above mentioned into court; both parties executed the bonds as ordered, and the notes were impounded. Appellees then moved that the money paid into court be distributed, and it was ordered that the same be paid to the solicitor of appellees "to be distributed and applied according to law." This order for distribution was excepted to by appellant.

August 12, 1913, appellees Shimeall and Dorgan filed a general and special demurrer, and on August 14, Hoover did likewise. September 18, appellees' solicitor served notice that on the 19th he would appear before the court and ask that the demurrers be set down for hearing on the contested motion calendar. September 27, 1913, (counsel for complainant not being present in court) an order was entered which states that the "cause came on for hearing on the defendants' demurrers." The court found the matter was properly set for hearing, and it was ordered that the "demurrers of the defendants and each of them * * * be and the same are each hereby sustained and the complainant's bill of complaint is hereby dismissed."

September 30, appellant's counsel served notices and affidavits that he would ask that the order sustaining the demurrers and dismissing the bill be set aside and vacated, setting up that the reason he had not contested the matter was through some error or misunderstanding. The motion to vacate the order was continued from time to time, and on October 27, 1913, an order was entered sustaining appellant's motion, and the order of September 27, was vacated and set aside. The same order further states, "said cause then coming on further to be

based on the [illegible] of said usury, as all set out in the bill of complaint," it was ordered that the demurrer be sustained and appellant was given until November 4, in which to amend the bill. November [illegible], appellant filed an amended bill, which is, in substance, the same as the original bill except that it alleges in more detail that appellee himself was threatening and had good reason that he threatened to [illegible] the balance of the notes by [illegible] proceedings which he had not already employed; that [illegible], unless restrained, would dispose of the notes to innocent third persons; that appellant would thereby be compelled to defend [illegible] and suffer great expense; that the notes were all tainted with usury, and that the matter can be adjusted in one suit. Appellant offered to do equity and tendered the amount of money actually loaned, with legal interest less any payments which had been made, and prayed for an injunction, an accounting and general relief. The amended bill was verified.

November [illegible], appellee filed a general and special demurrer to the amended bill. Appellee [illegible] filed [illegible] demurrer [illegible], 19[illegible], [illegible] of an order [illegible] on the appellees' demurrer to the amended bill. [illegible] demurrer was sustained and leave granted appellant to file [illegible] an amended and supplemental bill. [illegible] the amended and supplemental bill is substantially the same as the amended bill except that it sets up [illegible] subsequently to the filing of the original bill. [illegible], appellee filed [illegible] and the court sustained [illegible] the complainant did not [illegible] the defendant [illegible] of money admitted [illegible]

[illegible] bill, [illegible]

did not [illegible]

of filing the bill [illegible] supple-

mental bill could not [illegible]

amended bill [illegible] effective." [illegible]

[illegible]

of damages, and it [illegible]

[illegible]

to the complainants' solicitor [illegible]

and [illegible]

The court [illegible] cause of action

should [illegible]

[illegible] of damages." [illegible]

[illegible] on the question of [illegible]

[illegible]

[illegible] of damages [illegible]

cause [illegible] etc.

[illegible]

[illegible] the [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

the [illegible]

[illegible]

[illegible] court [illegible]

[illegible]

to [illegible]

the defendants and [illegible] the complainant for [illegible] the sum of $[illegible] contained in the [illegible] allowed. It was further ordered, adjudged and decreed by the court that the original order of [illegible], the jurisdiction of which was currently reserved in the court's order entered December 1st, [illegible], for the sole and only purpose of hearing and trying the defendants' demand set up in their written opposition to [illegible] filed herein, be and the same stands dismissed for want of equity." [illegible] this decree, the present appeal was prayed. [illegible] and on [illegible], counsel was granted that the defendants [illegible] on the ground that the name of the [illegible] had been [illegible]. This was denied, but it was ordered that the defendants' solicitor [illegible] on each of said orders one-half of the fees [illegible] and later at [illegible] the order of [illegible] was [illegible] to July 28, [illegible].

Appellees, as shown by the testimony taken on the trial of the [illegible] of the supersedeas, demurrer, claimed [illegible] solicitor's [illegible] to dissolve the injunction was made, July 28, [illegible], until the order was entered July 30, [illegible], and for [illegible] until the order of December 1, [illegible], was entered. - [illegible], the court allowed [illegible].

[illegible] the [illegible] contemplated [illegible] the court.

Appellees contend that the court [illegible] by bill (December 1, [illegible]) and [illegible] order. There is nothing before this court [illegible] error which [illegible] the court in [illegible] the order of [illegible] demurrer. [illegible] In this, counsel are [illegible] tively obstructive, and [illegible]

dissolving an injunction. (Sec. 125, Chap. 110, [illegible].) An order dissolving a preliminary injunction is interlocutory and not final, and no appeal will lie from such order. (Stromatolog v. McCaffrey, 177 Ill. App. 579; Ashill v. Walch, 200 Ill. 97; Williams v. Chicago Exhibition Co., 196 Ill. 19.)

The record affirmatively shows that the bill was not dismissed on December 1, but it was then ordered that "upon the hearing and judgment of the suggestion of damages [illegible] filed by the defendants the complainant's cause of action herein be dismissed for want of equity." And this order dismissed the bill except as to the question of the suggestion of damages, as was done in the cases of Williams v. Chicago Exhibition Co., supra; Large v. Columbia Yacht Club, 116 Ill. 417, and Kelman v. Stroschein, 178 Ill. App. 10, a different question would be presented. But the bill was not dismissed until March 21, [illegible].

Complaint is also made that the appeal is not properly before the court, in that the appeal bond recites that Ernest L. Lehmann is principal and it is signed by him, while in the condition named in the bond, the name is Ernest L. Lehmann. The objection is extremely refined, if a demurrer hypercritical, and altogether unwarranted. Ernest and Ernest are idem sonans.

The bill alleges that the face value of each of the notes given was double the amount of the loan, and they were, therefore, clearly usurious. (Lerman v. Kinchen, [illegible] Ill. 447; Drury v. Wolfe, 54 Ill. App. [illegible]; Kohn v. Dwyer, 247 Ill. 247.) And, as was said in the Lerman case, supra, (p. 447):

> "The real inquiry in every case is whether there has been a borrowing and lending at a greater rate of interest than the law allows; and this becomes purely a question of fact, to be determined

> from all the circumstances of the particular case. The law looks at the nature and substance of the transaction, and not to the color or form which the parties in their ingenuity have given it. No imaginable act or contrivance to cover up and conceal the usury will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable device or expedient. The courts will follow them through all their shifts and devices, and ascertain the true character and design of the transaction. And if upon such investigation, it appears that there was in substance a loan at an illegal rate of interest, no matter what form or shape the contract has been made to assume, it will be declared to be usurious, and the proper remedy applied."

In an action at law, where the contract is usurious, the whole of the interest is forfeited. (Sec. 2, Chap. 74, R.S.) But in a court of equity, a person applying for affirmative relief against a usurious contract, must pay the principal sum with legal interest. (Clark v. Minton, [illegible] Ill. [illegible]; Locke v. Thomas, [illegible] Ill. [illegible]; Keller v. Equitable Trust Co., 141 [illegible] 784.) If, therefore, appellant is entitled to relief, he must pay the amount which he borrowed, together with legal interest. Appellees contend that the demurrer was properly sustained because appellant had an adequate remedy in an action at law: that want or failure of consideration is always a proper defense in such a proceeding. This is undoubtedly true where the action is between the parties to the note, but such a defense cannot be made where a negotiable instrument is in the hands of a bona fide holder. At the time the bill was filed, several of the notes were not due, and it was averred that appellees had threatened and were about to dispose of some of the notes to innocent third parties. The remedy of appellant was inadequate save in a court of equity.

Appellees further contend that the appellant did not tender the amount of money he admitted was due from him to appellees before the filing of the original bill, and did not bring the money into court at the time of the com-

mencement of the suit, and that as neither the original nor amended bill shows any grounds for relief, these defects were fatal and could not be cured by a supplemental bill, and therefore the demurrer was properly sustained. This seems to have been the view taken by the learned chancellor. On the question of tender, the appellee relies chiefly upon the cases of Lippincott v. [illegible], [illegible] Clark v. [illegible], [illegible] and [illegible] v. [illegible], [illegible] Ill. [illegible]. In the Lippincott case, supra, the bill filed sought to declare a conveyance, absolute on its face, to be but a mortgage. After setting up the facts it averred that the complainant paid the defendant a certain amount of money which he had deposited with the clerk subject to the order of the court. The principal question there was as to whether the contract was a mortgage, and whether parol evidence was admissible to vary the terms of a deed. Whether the tender of the money was necessary, was not a question in that case. In the Clark case, supra, the question was whether a conveyance of land was a sale, as shown by the deed, or a mortgage. No tender was made, and the question was not discussed. In the [illegible] case, supra, was a suit [illegible] to cancel certain quit-claim deeds, etc., alleging fraud in the contract. The question of tender was not there discussed.

In Hinton v. [illegible], [illegible] a bill was filed by the vendor against the vendee [illegible]. It averred that the vendee had executed a promissory note for part payment of the land; that the note had not been paid; that the conveyance had been obtained by fraud, and prayed that the vendor be given a vendor's lien for the balance of the purchase price. In passing upon the question of tender, the court said, (p. [illegible]):

Counsel further insist that [illegible]

> offer on the part of complainant to return the note, [illegible] to restore the [illegible] status quo before the commencement of the suit. There is a sufficient offer or tender in the bill by the averment that complainant 'was ready and willing and hereby offered to surrender the note.' A formal tender is not essential to equitable relief where the party offers to do equity in his bill."

To the same effect is the case of Clay v. Goodrich, 172 Ill. 576. In that case, a bill was filed [illegible] had been closed. It was insisted that it was a condition precedent to relief that a valid tender be made of the amount due [illegible], and that a tender be kept good. In ruling on this question the court said, (p. 580):

> "A court of equity is not bound by any rule requiring the complainant to bring money into court in a case in which he may by a decree be required to pay money, before a decree will be entered in the cause. The money may be required to be brought into court at such time after the rights of the parties are determined, and the failure to produce it in court at the time of filing the bill, and consequently having it there, cannot be [illegible] the suit [illegible] (Ebbert v. [illegible], 77 Ill. [illegible]; [illegible] v. [illegible]; [illegible] County v. Vandenberg, 27 Ill. [illegible]; [illegible] v. [illegible], [illegible]) Still, [illegible] may be sufficient to authorize the court to bring the money into court [illegible] for the payment. In a bill [illegible] tender and the [illegible] unwilling the same subject to the order of the court [illegible] willingness to bring the money into court [illegible] equitable relief [illegible] v. Hall, [illegible] offer [illegible] sufficient [illegible] of tender in that respect."

There are cases holding that an allegation of tender is necessary to [illegible] (Jarrett v. [illegible]; [illegible] v. [illegible], [illegible]) [illegible] applicable to the facts in the case at bar. In the bill, it is [illegible] averred that [illegible] ready and willing [illegible] to pay whatever amount [illegible] found due. This is sufficient.

Appellee's contention that where the original bill fails to state ground for equitable relief, such defect cannot be cured by supplemental bill, is undoubtedly a correct statement of the law. ([illegible] v. [illegible], [illegible] Ill. 444.) The office of a supplemental bill is to bring before the court only such matters as have taken place subsequently to the filing of the bill, and the complainant's claim or relief can be sustained only by matters of the various occurring before the bill was filed, though the decree was properly considered upon the bill as amended. In one of the briefs, I observe that appellant stated grounds for equitable relief in the bill, the amended bill, and the several supplemental bills; that he is entitled to a preliminary injunction, and that the court erred in dissolving the injunction and dismissing the bill.

Holding, as we do, that appellant stated grounds for relief, it will be unnecessary to discuss the other questions argued. The decree of the circuit court will therefore be reversed and the cause remanded with directions to overrule the demurrers to the amended and supplemental bills, and for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

642 - 20990.

MAY C. DELANEY,
Appellant,

vs.

McNEIL & HIGGINS COMPANY, a corporation, and CHARLES I. ROSS, Trustee,
Appellees.

) Trial Term
) SUPERIOR COURT
) COOK COUNTY.

195 I.A. 524

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from a decree of the Superior Court of Cook County, decreeing the foreclosure of a mortgage, as prayed for in the cross-bill, and dismissing the original bill for want of equity. The facts are these: May C. Delaney, appellant, hereinafter called the complainant, on March 3, 1911, acquired a grocery and market from her brother-in-law, Patrick J. Delaney, a brother of her husband. The complainant's husband, George T. Delaney, had been conducting a store for a number of years prior to March 3, 1911, and purchased supplies from McNeil & Higgins Company, one of the appellees, hereinafter referred to as the defendant. He had been in ill health, and in order to convey his property and business to his wife, without going through the Probate Court, he transferred them to his brother, Patrick J. Delaney, and on the same day, March 3, 1911, Patrick J. Delaney transferred, through proper instruments of conveyance, all the property to the complainant. At the time of the transfer, George T. Delaney was indebted to the defendant in the sum of $2187.00. A few days after the transfer, complainant began to conduct the business, and on March 4, 1911, began purchasing merchandise from the defendant, and continued so to do regularly until January, 1912. About March 6, 1911, a representative of the defendant called up the complainant on the telephone at her place of business, and inquired if she had taken over her husband's business. He testified that the person answering the telephone stated that she was Mrs. Delaney, and that she had taken over her husband's property and business. (Her husband died June 11, 1911.) She then produced

to pay the balance due from her husband to the defendant, not all at once, but some every month, and that she could spare a check in a short time. Complainant testified that she never ### talked with the witness over the telephone about this matter. The witness did not recognize the voice, but afterwards, having met the complainant several times, he testified that it was the complainant with whom he talked on the telephone. A few days afterwards, complainant sent defendant a check for $500 on account. At that time she had purchased but ##### $200 worth of merchandise from the defendant. The account was carried on the books of the defendant all the time in the name of complainant's husband, and every month statements were sent to her showing the balance due, and in each statement was included the balance due from her husband. The defendant had been pressing for payment from time to time, and on January 15, 1913, complainant went to defendant's place of business, and executed a note for $2677, due 90 days after date, with interest at seven per cent., and secured the same by a trust deed on the real estate in question. This amount was the balance due at that date for all goods purchased by complainant or her husband from the defendant. At that time, there was a balance due on account of the goods purchased by the complainant from the time she conducted the business, in excess of what she had paid, of $1447.54. Complainant contends that she at no time promised to pay the debt of her husband, and that she did not know she was signing a trust deed and note, but thought it was a schedule of her assets; that the note and trust deed were obtained from her by means of fraud and deceit.

On October 28, 1913, she filed her bill of complaint in the Superior Court against the defendant. The bill prayed for an accounting, alleging that she had tendered the balance due defendant, $1447.54, which was refused; and asking that the note and deed be delivered up and cancelled. The defendant answered, denying fraud and deceit,

and averring that all matters were fully explained to and understood by the complainant. On January 18, 1918, the defendant filed a cross-bill, asking that the mortgage be foreclosed.

The original bill came on for hearing before the chancellor, who found that the charge of fraud and deceit had not been sustained: that the equities were with the defendant, and decreed that unless the amount due the defendant on the note was paid within twenty days, the defendant would be entitled to proceed with the hearing on its cross-bill. The payment not having been made, evidence was heard in open court on the cross-bill and answer, and a decree entered dismissing the bill for want of equity, and granting the prayer of the cross-bill.

Complainant contends that there was error in the admission of the conversation over the telephone hereinabove mentioned, on the ground that the witness did not recognize the voice. This is not the law. (Hodair v. Com Nat. Bank, 285 Ill. 470.) In that case it was held that "when a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible."

Complainant further contends that even if there was a promise on her part to pay the debt of her husband, the promise not being in writing, was within the statute of frauds, and therefore void. The instrument sought to be foreclosed in this case is in writing, and the statute of frauds has no application.

On the question of fraud and mistake in the execution of the note and trust deed, the evidence was conflicting. We have gone

over this evidence carefully, and have no hesitancy in saying that it does not sustain complainant' contention. The chancellor saw and heard the witnesses in open court, and found that the contention of the complainant was not sustained by the evidence. Such finding will not be set aside in a court of review unless manifestly against the weight of the evidence. (Hess v. Gillahan, [illegible] Ill. [illegible]; Phelan v. Hyland, 197 Ill. [illegible]; Delaney v. Delaney, 175 Ill. 137.)

It has been repeatedly held by our Supreme Court that fraud will never be presumed, but must be proved by clear and convincing evidence. (Lehman v. Nicholberry, [illegible] Ill. 117.) This, complainant has failed to do.

Furthermore, the complainant received all of her husband's estate, and there is nothing inequitable in her paying his debts, the decree requires her to do. In consideration of her promise to pay, she was given additional time, and further credit was extended to her.

Finding no substantial error in the decree of the Superior Court of Cook County, it will be affirmed.

AFFIRMED.

679 - 21017.

WILLIAM K. PATTISON, as Administrator of the Estate of ANDREW SIEGLER, Deceased,	)	
Appellee,	)	APPEAL FROM
	)	SUPERIOR COURT
vs.	)	
	)	COOK COUNTY.
CHICAGO CITY RAILWAY COMPANY,	)	
Appellant.	)	

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Appellant, hereinafter referred to as the defendant, by this appeal seeks to reverse a judgment for $6,000 rendered against it and in favor of appellee, hereinafter called the plaintiff.

The facts are as follows: On December 5, 1908, the defendant owned and operated street cars in State street, Chicago. State street extends north and south, and is intersected at right angles by 13th and 14th streets. The distance between these two last mentioned streets is about six hundred feet. On the east side of State street, and about the middle of the distance, was a large barn of the Dixon Transfer Company. There were two entrances to the barn from State street. The company was engaged in the teaming business, and had about two hundred wagons and teams. In front of the entrance to the barn on the east side of the street, was an electric arc light. This entrance was about three hundred feet from 13th street and the same distance from 14th street. There was a similar light almost immediately west on the west side of State street. It was the custom of the Dixon Company to have a watchman or flagman, in the evening, in front of the barn entrance and near the street car tracks, to signal the motormen and the drivers of the teams, so as to prevent collisions. The flagman usually had a lighted lantern in his hand, but there was some evidence that the signals were sometimes given by the flagman waving his hand only. This custom was known to the drivers of the teams and to the street car men operating cars on State street, and had been in effect for

a considerable period of time. During that season of the year, shortly before the holidays, teams would come into the barn from the day's work until after ten o'clock at night. On the day in question, plaintiff's intestate, Kohler, together with the other teamsters of the Dixon company, were hauling ice until a late hour. Located near Canal and Sandusky streets. Each of the three had a team and wagon. One of the teams were loaded with Butler brothers, and the three started, about nine o'clock, for the barn, driving south in this street. As they reached about 7th street, plaintiff's intestate was in the lead, but at this point one of the other drivers who did not have any load, drove ahead of him. They were all on the west side of the street. When the driver without a load was about opposite the barn, he was signalled by the flagman to drive to the barn, which he did. Plaintiff's intestate and the other driver waited on the west side of the street for a car signal. The first team had come into the barn, when the flagman signalled plaintiff's intestate to come to the barn, and at the same time signalled the motorman who was coming north on the east track, to stop the car. The night was bright and a street car for that could be seen for about two blocks. As plaintiff's intestate drove east across the tracks, the car struck the rear wheel. Throwing the wagon around to the south, and the plaintiff's horse was thrown off on the pavement. The car was some distance beyond the wagon and came to a stop. The injured man was placed on the platform of another car coming from the south, and was taken to a hospital, where he died two days later as a result of the injury.

There is considerable dispute as to the location of the car and the wagon at the time the signal was given by the flagman, some stating the car was near 14th street, others said it was about three hundred feet south of the barn for flagman signal, and others placing it at a distance farther north. There is also some conflict as to whether the flagman was between the track and the barn, but there is no

dispute that if he did ### have such a lantern, it was not lighted, it having accidentally gone out, and that the signal was either given by his hand or by swinging the unlighted lantern. The motorman testified that he saw the signal, but thought it was someone who wanted to board the car as a passenger, and he paid no attention to the signal. The flagman had to jump off the track to escape being struck with the car, as he testified no effort was made to stop it. The motorman testified that the team driven by plaintiff's intestate came from behind a south bound car on the west track, and that he did not see the team until it was too late. Other witnesses testified that there was no other car in the vicinity, but that a car had proceeded south sometime before. The deceased was a man thirty-seven years of age, weighed about [illegible] pounds, and was strong and healthy.

No complaint is made of the amount of the judgment.

But two errors are assigned: (1) that the verdict is against the manifest weight of the evidence, and (2) that the court should have given one instruction for the defendant which was refused. The defendant contends that the verdict is against the manifest weight of the evidence in that it clearly shows that the deceased, at and just prior to the time of the accident, was guilty of contributory negligence: and therefore, under the law, no recovery could be had: that it is contributory negligence, as a matter of law, for one to go upon a street car track with knowledge that a car is approaching, and that a collision is inevitable unless the speed of the car is slacked or the car stopped. As a general proposition, the question of contributory negligence is one of fact for the jury. (Seybert v. Sterling D. & S. Ry. Co., 187 Ill. App. 573: Chicago City Ry. Co. v. Amartsen, 1[illegible] Ill. App. [illegible]: Chicago Union Traction Co. v. Jacobson, 217 Ill. 404.) Yet, when the inference of negligence necessarily results from the evidence, it becomes a question of law for the court. (Smith v. Chicago [illegible] Ry. Co., [illegible] Ill. App. 64[illegible]; Lee v. Chicago City Ry. Co., 137 Ill. App. 51[illegible]:

Langlois v. Chicago City Ry. Co., 141 Ill. App. [illegible].) But under the facts in this case, as disclosed from the evidence, which was conflicting, we are clearly of the opinion that whether the deceased, at and prior to the time of the injury, was guilty of contributory negligence, was properly left to the jury. (Lang v. Chicago Ry. Co., 141 Ill. App. 364; Chicago Union Traction Co. v. Jacobson, supra.)

Defendant's second contention is that the court erred in refusing defendant's instruction number two. This instruction told the jury that the defendant had a superior right of way over persons and wagons in the portion of the street occupied by its tracks, except at street intersections, having due regard to the rights and safety of persons in the street; that it was the duty of persons driving teams to recognize this right, "and when crossing the tracks, to do so in a manner not to obstruct or delay the same," and that if the jury believed from the evidence that the deceased, at the time in question, failed to recognize such superior right of way, "but, on the contrary, negligently attempted to cross the tracks, in front of the street car, without due regard to its superior right of way, and thereby caused or proximately contributed to cause the collision, then the plaintiff cannot recover in this case."

It is insisted that this instruction stated the law correctly, as applicable to this case, and reliance is chiefly placed upon the cases of N. Chicago Elec. Ry. Co. v. Pauser, [illegible] Ill. [illegible], and Seybert v. Sterling, Dixon & N. Bl. R. Co., [illegible] Ill. App. [illegible]. In the Pauser case, supra, the plaintiff was driving in the street car track in Milwaukee avenue. A car was coming from behind. The night was dark, and the gong was sounded repeatedly. The plaintiff failed to turn out of the track in time, and the vehicle in which he was riding was struck by the car. The instruction refused in that case was that the car company, as a carrier of passengers, by reason of the inability of its cars to turn out, [illegible]

vested with the right of way over other vehicles. That it is the duty of drivers of vehicles to turn out and allow the cars to pass, "and to use care not to obstruct and hinder the cars." [illegible] at bar, the instruction told the jury that drivers, in crossing tracks, must do so in a manner not to obstruct or hinder the cars, not that drivers should "use care" not to obstruct or delay the cars as in the [illegible] case, *supra*. The instruction was too broad. [illegible] also, the instruction in the [illegible] case, *supra*, [illegible] of drivers of vehicles in [illegible] "use care" not to obstruct or delay the cars.

In *Litchfield Consolidated Ry. Co. v. [illegible]*, [illegible] App. [illegible], the court, in discussing the *Lawler* case, *supra*, said, (p. [illegible]): "In the former case appellee was not using the railway track in the street for the purpose of traveling continuously thereon in conflict with the [illegible] right of the street railway company, but was necessarily compelled, in consequence of an obstruction in the street in his line of travel, temporarily to go upon the track."

In the *Lawler* case, *supra*, the court was considering the relative rights of the traveller where the driver of the vehicle was travelling longitudinally on the street car track in front of the street car, and not where the driver was attempting to cross the tracks, as in the case at bar.

In [illegible] [illegible] [illegible] [illegible], [illegible] Ill. [illegible], it was held [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the jury [illegible] [illegible] guilty of negligence [illegible] ordinary care.

[illegible]

In the case of [illegible] [illegible] [illegible]

434 - 19847.

James A. Jennings, Appellant,	)	APPEAL FROM
vs.		CIRCUIT COURT
The Baltimore and Ohio Railroad Company, et al., Appellees.		COOK COUNTY.

STATEMENT OF THE CASE. This is an action brought by James A. Jennings, appellant, hereinafter referred to as the plaintiff, against the Baltimore & Ohio Terminal Railroad Company and the Baltimore & Ohio Railroad Company, appellees, hereinafter designated as the defendants, for injuries sustained in a collision which occurred in the city of Chicago May 4, 1911, when plaintiff's automobile, while proceeding north on a thoroughfare known as Independence boulevard, was struck by the rear end of an eastbound passenger train. The trial resulted in a verdict of not guilty, upon which the judgment was rendered, to reverse which this appeal has been prosecuted.

MR. JUSTICE PAM delivered the opinion of the court.

The declaration contained four counts, wherein it was alleged that defendants owned and operated a certain railroad in the city of Chicago, which railroad crossed a certain public highway known as Independence boulevard; that plaintiff, while in the exercise of due care and diligence for his own safety, was riding in an automobile over the crossing made by the intersection of said railroad with Independence boulevard, he was struck by the rear end of a train of cars, which train of cars was owned and operated by said defendants and was under the control of the servants of the defendants. Said counts charged defendants with negligence (1) in the operation of said train, (2) in the failure to ring a bell or sound a whistle, as provided by our statutes, and (3) in the absence of the crossing flagman, - a servant of said defendants - in such manner,

wilfully and negligently beckoning plaintiff to enter upon the crossing while said train was approaching.

Both defendants pleaded the general issue. The defendant, the Baltimore & Ohio Railroad Company, however, in addition, included in said plea a statement which it maintains was a notice in writing under the statute, of a special defense to be relied upon at the trial, which statement was as follows:

> "Said defendant, the Baltimore & Ohio Railroad Company, further says that it was not the owner of or in control of or in possession of the certain locomotive engine and the certain train of cars thereto attached, or of the railroad or railroad tracks upon which the same were driven, as alleged in said declaration, and the several counts thereof, nor that said locomotive engine and train of cars referred to in said declaration and the several counts thereof, was not at the times in said declaration mentioned, or any of them, under the care and management of any servants of this defendant."

Upon the trial below plaintiff introduced evidence tending to prove the allegation of the declaration. Plaintiff also introduced in evidence certain facts which he claims, in themselves, or by the reasonable inferences that flow therefrom tended to show, that the defendant, the Baltimore & Ohio Railroad Company, owned, controlled and operated the train of cars which collided with plaintiff's automobile, and that the said engine and train of cars and crossing were under the care and management of servants of the said Baltimore & Ohio Railroad Company.

At the close of plaintiff's case, the Baltimore & Ohio Railroad Company, after making the court to instruct the jury for the defendant and submitting a written instruction to that effect, rested. The defendant, the Baltimore & Ohio Chicago Terminal, after submitting a similar motion and instruction, proceeded with its defense under its plea of general issue. At the close of all the evidence, both defendants again renewed their motions for an instructed verdict, which motions were denied, whereupon the cause was submitted to the jury and the verdict returned upon which the judgment herein complained of was entered.

Plaintiff contends, first, that [illegible] record, the Baltimore & Ohio Railroad Company was without defense, and that the evidence did not even tend to support the verdict. The basis of this contention is, first, the plea of general issue and notice of special defenses thereunder did not sufficiently deny the control or ownership of the agencies involved in the collision, wherefore said plea was only one of general issue, and therefore there was no issue presented as to the ownership, management or control of either the railroad or the locomotive and cars: and secondly, that even though there had been an issue as to ownership and control, the Baltimore & Ohio Railroad Company having rested at the close of the plaintiff's case, the evidence offered on behalf of the plaintiff clearly making out a prima facie case and standing uncontradicted, there could only have been a verdict of guilty as to the defendant, the Baltimore & Ohio Railroad Company.

While plaintiff contends that said notice of special defenses failed to sufficiently traverse the allegations of ownership, management and control on the part of the Baltimore & Ohio Railroad Company, this contention was not raised until plaintiff had submitted his instruction, at the close of all the evidence, and it was inconsistent with his action in offering, as part of his proof to sustain the case, evidence tending to show ownership and control in the said Baltimore & Ohio Railroad Company: furthermore, we are of the opinion that the notice of special defense under the general issue was amply broad and clear to meet the requirements of Section 41, Ch. 110, Hurd's R. S. of Illinois. The court therefore properly refused instruction #1 offered on behalf of the plaintiff, wherein the court was asked to instruct the jury as a matter of law that the Baltimore & Ohio Railroad Company, under its plea filed in the case, admitted the ownership, management and control of the railroad, cars and locomotive in question.

This brings us to the second point of the plaintiff, the determination of which involves not only the question whether or not defendant owned, controlled and operated the railroad, cars and locomotive in question, but also, granting that the jury might have been warranted in finding that the Baltimore & Ohio Railroad Company did manage and control the railroad, cars and locomotive in question, whether or not they were further warranted in finding the defendant, the Baltimore & Ohio Railroad Company, not guilty.

Plaintiff maintains that the Baltimore & Ohio Railroad Company having rested, the only evidence in the case as to the said co-defendant was plaintiff's: that said evidence fairly tended to show that the Baltimore & Ohio Railroad Company did own and control the railroad and cars and locomotive in question, and also tended to support its charges of negligence against said defendant: that therefore the only verdict which the jury could have properly returned as to the defendant, the Baltimore & Ohio Railroad Company, was one of guilty, as it stood without defense. After plaintiff closed his case, the defendant, the Baltimore & Ohio Railroad Company, having rested, could have asked that the jury be instructed only upon plaintiff's evidence, and further that the evidence offered on behalf of the co-defendant could not be considered by them in arriving at their verdict as to it. Condon v. Schoenfeld, 356 Ill. 426. However, it also could waive its rights in that regard. There can be no question that if defendant, the Baltimore & Ohio Railroad Company, after having rested, although offering no evidence, had examined any of the witnesses offered on behalf of the other defendant, the right inuring to it under its motion for an instructed verdict, at the close of plaintiff's case, of having no evidence other than the plaintiff's considered by the jury, would clearly have been waived. Postal Tel. Co. v. Likes, 222 Ill. 248. In the case at bar, while the Baltimore & Ohio Railroad Company did not cross-examine any of the witnesses in-

trounced after it had rested, it did, however, submit an instruction to the court at the close of all the evidence, for a directed verdict, not confining said instruction to the evidence offered on behalf of the plaintiff, and it also offered further instructions upon the facts and the law in the case based upon the evidence, without limiting it to plaintiff's evidence: it clearly submitted to the jury not only the evidence of the plaintiff but also that offered on behalf of the co-defendant. Kiesbach v. Bottler Lumber Co., 184 Ill. App. 547. If the jury, as already stated, had found defendants guilty, the Baltimore & Ohio Railroad Company would not now be in a position to assert that they were not warranted in considering all the evidence offered in this case. Therefore, in the case at bar, the jury had the right to consider all the evidence on all the issues in controversy, and were not confined to that offered on behalf of the plaintiff. The question then arises, whether, from all the evidence in the case the jury were warranted in arriving at their verdict.

The evidence on behalf of the defendant, the Baltimore & Ohio Chicago Terminal, further tended to show that it owned, controlled, managed and operated the railroad and the train in question, and that the persons in charge of said railroad and train were its servants. By its offered instruction No. 23, plaintiff also submitted this as a question of fact to the jury. Even though he intended it as a safeguard in the event of the refusal of instruction No. 21 by the court, yet as having held that instruction No. 21 was properly refused, plaintiff, by offering instruction No. 23, submitted this as a question of fact to the jury. If the verdict against the plaintiff depended upon the jury's determination of the question whether or not said Baltimore & Ohio Railroad Company did or did not control the said train, we cannot say that on this issue the verdict was clearly and manifestly against the weight of the

evidence.

There remains the question that even though the jury may have believed that the defendant, the Baltimore & Ohio Railroad Company, controlled, either solely or jointly, the railroad and cars in question, whether they were warranted, under the facts in evidence and the instructions of the court, in finding the Baltimore & Ohio Railroad Company not guilty. The fact remains that the jury, on the evidence offered by the Baltimore & Ohio Chicago Terminal found that company not guilty. There was no denial by that company of the ownership and control of the agencies involved. The plaintiff's evidence as to negligence having been offered as against both defendants, and under our holding the jury having the right to consider all the evidence, including that given on behalf of the Baltimore & Ohio Chicago Terminal, in determining the issue whether or not each or both of the defendants was guilty of the negligence charged in the declaration, it follows, as a matter of course, if the jury were warranted in finding that issue in favor of the Baltimore & Ohio Chicago Terminal they were also warranted in so finding as to the Baltimore & Ohio Railroad Company. This brings us to the consideration of the other contentions of the plaintiff which involve not only the Baltimore & Ohio Railroad Company, but both defendants.

Plaintiff first contends that the trial court erred in the giving of instruction No. 40 on behalf of the defendants. Said instruction was as follows:

> "The second count of plaintiff's declaration charges a violation of the statutes of Illinois with reference to the sounding of a bell or the blowing of a whistle. As to this count the court instructs you that the statutes of Illinois do not require both the sounding of a steam whistle and the ringing of a bell continuously for a distance of at least 80 rods prior to reaching a highway crossing and until such crossing is reached, but under the statute if a bell is sounded or a whistle blown continuously for a distance of 80 rods prior to reaching a highway crossing and until such crossing is reached, in such case the statute is complied with."

Plaintiff's argument is that there was no adequate evidence in the record upon which to base said instruction. We cannot concur therein. There is evidence in the record that the bell on the locomotive of said train, - which was being operated by an automatic ringer - was sounded from the time said train reached the city limits up to the time of the accident, and that it was not shut off until after the train had come to a halt at the scene of the accident. We are of the opinion this evidence was sufficient upon which to base the said instruction.

Plaintiff then complains of the refusal of the court to give instruction No. 2, contending that said instruction presented the "last clear chance" doctrine, and that the evidence in the case warranted the giving of said instruction. Without passing upon the question whether or not, under the facts in the case, plaintiff was entitled to an instruction based upon the doctrine of the last clear chance, it is sufficient to say that the instruction as submitted did not correctly present that doctrine to the jury, but was involved and misleading.

Plaintiff also complains of the refusal by the court to give its tendered instruction No. 40. This instruction clearly invaded the province of the jury and the court properly refused same.

Since plaintiff, in his assignment of errors, complains that the verdict is against the weight of the evidence as to both defendants, he does not urge same in his brief and argument, save that as to the defendant, the

Baltimore & Ohio Railroad Company, the said company having rested, the jury, under the evidence offered by plaintiff, could only have found said defendant, the Baltimore & Ohio Railroad Company, guilty. We have already held, however, that in the case at bar the jury had the right to consider all the evidence offered in the case in arriving at their verdict as to both defendants. However, in the course of plaintiff's argument as to the errors of the court in refusing certain instructions offered by plaintiff and the giving of certain instructions on behalf of the defendant, he refers to the facts and circumstances in evidence and practically makes the argument that the verdict is contrary to the weight of the evidence.

Evidently plaintiff's theory of the accident was, that the flagman, apparently of the belief that although a train was approaching, it was either going to stop before reaching the crossing or that there was sufficient time for plaintiff to cross before the arrival of the train at the intersection, invited plaintiff to cross the tracks at the time in question. Defendant, however, introduced testimony to the contrary. The issue presented by this conflicting testimony was a question of fact to be determined by the jury. Upon the other issues,- as to the negligence of the defendants in the operation of said train, whether or not plaintiff was in the exercise of ordinary care, whether or not defendants observed the statute with reference to the ringing of a bell or the sounding of a whistle,- the testimony also was conflicting, therefore also presenting questions

of fact for the jury. As we read the record, the facts and circumstances in evidence would have supported a verdict for either the defendants or the plaintiff. However, the jury having found for the defendants, they evidently attached greaterweight to the evidence offered on behalf of the defendants. It is a well established principle of law that where the evidence is conflicting, we cannot disturb the verdict unless it is clearly and manifestly against the weight of the evidence. This we are unable to say.

Plaintiff's contention that the trial court erred in refusing to admit the testimony that plaintiff was married and that before his injury children had been born of this marriage, is without merit.

In view of the opinion already expressed, the other point raised by plaintiff - viz., invalidity of the judgment as to one appellee will vitiate it as to both - becomes immaterial, and it is therefore unnecessary for us to pass thereon.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

465 - 21663

ALBERT C. DAY, Trustee, etc., Appellant, vs. MICHAEL ZIMMER et al., Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

1951 I.A. 347

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Appellees move the Court to dismiss the appeal for the failure of appellant to file an appeal bond within the time allowed by the trial Court, and also to strike from the record the certificate of evidence because the same was not filed until after the lapse of the time allowed by the Court in which to file the same.

The decree appealed from was entered April [illegible], 1915. In this decree thirty days was fixed as the time within which the appeal bond must be filed, and sixty days were allowed for the filing of a certificate of evidence.

The appeal bond was filed and approved June 1, 1915. The certificate of evidence was signed by Judge [illegible] (Judge Windes being the trial Judge) October 21, 1915, nunc pro tunc as of July [illegible], 1915, and ordered filed as of the last named date.

On July 1, 1915, an order was entered extending the time within which to file the certificate of evidence thirty days from the 26th of June, 1915. The decree appealed from was entered at the April term of the Court and no extension of time within which to file the bond was asked or allowed at that term, and the bond was filed and approved after the lapse of the time allowed by the Court and in the succeeding July term. On July 1, 1915, [illegible]

after the entering of the decree and after the term at which the appeal was allowed, an order was entered enlarging the time in which to file the certificate of evidence thirty days from June 23, 1916.

Gill v. City of Chicago, 243 Ill. 178, is decisive of the questions here raised, and so far as the appeal bond is concerned presents nearly the same conditions as found in the case before us. In the Gill case, as here, the appeal bond was approved after the allotted time had elapsed, and it was held that if the time allowed by the court expires without an extension before the appeal bond is filed, the right to appeal is lost.

The order extending the time to file the certificate of evidence was entered after the lapse of sixty days allowed in the decree. This order was without force, as the Court was without jurisdiction to enter it, the term at which the appeal was taken having passed.

The certificate of evidence is signed by a judge who did not hear the case or enter the decree, and as no reason appears in the record for his so doing, his action is a nullity and without force.

The cases cited by appellant in opposition to these motions do not sustain his contention. Appellant is not within the ruling of Smith v. Smith, 243 Ill. 63, because the extension of time was not allowed at the final term. The court say in the Smith case, supra: "The order allowing an appeal and fixing the time of filing the bond or the bill of exceptions, like any other order, can be extended if the extension is applied for during the term of court at which the order is entered." And in Hagert in' Ridgeville Association v. Hagert, 164 Ill. 184, it is said: "The court had the power, at any time during the term, to

make a further extension of time, * * and while no such order was made, the certificate was filed during the term while the court retained jurisdiction of the matter. * * *"

The order extending the time to file the certificate of evidence was at the June term, while the decree was entered and the terms of the appeal settled at the April term of the court.

The motion to strike the certificate of evidence from the record is allowed and the appeal is dismissed.

19 - 20504

SIDNEY S. DAVID,
Defendant in Error,

vs.

MARK MAY, WALTER E. HART and
THOMAS W. THOMPSON,
Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

STATEMENT OF THE CASE. On February 11, 1914, Sidney S. David, plaintiff, commenced an action of the fourth class in the Municipal Court of Chicago against Mark May, Walter E. Hart and Thomas W. Thompson, defendants. In plaintiff's amended statement of claim it is alleged that

> "Plaintiff's claim is to recover from the defendants, jointly and severally, the sum of $250, with interest thereon from April 19, 1913, due and owing to the plaintiff by the defendants and converted by them and each of them to their own use; that defendants procured from the plaintiff the sum of $250 upon the representation and condition that they were forming a bank to be known as the Public Trust & Savings Bank, and that said defendants have failed to and have not organized said bank and have abandoned said project; that plaintiff has demanded from the defendants the return of said $250 * * and that they and each of them have failed, neglected and refuse to return said money; that defendants fraudulently and falsely represented to plaintiff that the organization of said bank would be completed not later than July 1, 1913, and would issue stock therein to the plaintiff, which they have failed, neglected and refuse to do."

The defendant May was defaulted for failure to file an affidavit of merits. The other defendants, Hart and Thompson, filed separate affidavits of merits denying the allegations of plaintiff's statement of claim and denying joint liability. The cause was tried before a jury and a verdict was returned finding all of the defendants "guilty of having maliciously, wilfully and intentionally, and with intent to injure and defraud the plaintiff, converted to defendants' own use the property of the plaintiff, to-wit, $250, lawful money of the United States of America," and

assessing plaintiff's damages at the sum of $250. Judgment was entered on the verdict against all of the defendants.

Upon the trial plaintiff testified that on April 19, 1913, he received a call from the defendant Mark May; that May stated that he, in connection with Hart and Thompson, was organizing a bank to be called the Public Trust & Savings Bank and to be located in the Hearst Building, Chicago; that it was to be organized and ready for business by July 1, 1913, and that he desired plaintiff to buy certain shares of stock in the bank; that he (plaintiff) thereupon purchased 20 shares of said stock and signed and delivered to May his check for $250, the same being a 10% payment on said shares, and that he at the same time received from May a written receipt. The check and receipt were admitted in evidence. The check, dated April 19, 1913, and drawn on the Northwest State Bank and made payable to the "Public Trust & Savings Bank," was endorsed "Public Trust & Savings Bank Organization, Mark May, Thomas W. Thompson, W. E. Hart" and also "Lincoln State Bank," and was paid by said Northwest State Bank and returned, canceled, to plaintiff. It does not appear from the evidence that the endorsements thereon of the defendants, Thompson and Hart, were in their handwriting. The said receipt was also dated April 19, 1913, was signed by the defendant May "Mark May, W. E. Hart, Thomas W. Thompson, Commissioners, by Mark May," and was as follows: "Received of Sidney S. David $250, being partial payment for 20 shares of the capital stock of Public Trust & Savings Bank. Certificate of stock will be issued to the legal holder hereof when the Capital is fully paid in, upon surrender of this interim receipt to the Commissioners named hereon." Plaintiff further testified that he never received any shares of stock in the Public Trust & Savings Bank, that no shares were ever tendered to him by anyone and that the

money, so paid out, was never returned to him; that about July 18, 1913, he telephoned the defendant May inquiring why the bank had not been organized and why he had not received the shares of stock for which he had subscribed, that May answered that he had had trouble in raising the necessary capital and had been delayed, and that plaintiff replied that if the organization was not completed by August 1, 1913, his money must be returned to him; that he (plaintiff) never had any conversations or business transactions with either Thompson or Hart, and that no representations of any kind were ever made to him by either Thompson or Hart. R. J. Roepke, chief clerk of the Lincoln State Bank and a witness for plaintiff, testified that said bank had an account with the "Public Trust & Savings Bank, Mark May, Walter M. Hart and Thomas W. Thompson"; that he (Roepke) knew Mark May only; that moneys had been deposited by said May to the credit of said account; that the account was still open; that certain moneys had been withdrawn from said account by means of checks signed by the defendants, as commissioners, and that there was in said account the sum of $62.50 to the credit of said defendants. Two checks were identified by the witness as having been drawn on said account and paid, and were admitted in evidence. One check was for $625, dated June 27, 1913, and the other check was for $25, dated July 3, 1913. They were signed "Public Trust & Savings Bank, Commissioners, Mark May, Walter M. Hart, Thomas W. Thompson."

The defendant May did not testify. The defendants Hart and Thompson testified that they, together with the defendant May, acted as commissioners in the organization of the Public Trust & Savings Bank, which organization had not yet been completed; that no stock had been issued to anyone; that they (Hart and Thompson) joined with May at his request

in signing the checks above mentioned and other checks, but that they could not tell definitely for what specific purposes certain of the funds so deposited in said Lincoln State Bank had been disbursed as they depended largely on May to attend to the disbursements; and that they never received or used for their own benefit any of the moneys so deposited or collected on plaintiff's subscription to said stock.

The defendants Hart and Thompson sought to introduce in evidence a document signed by the plaintiff at the time he delivered to May his check for $250, but the court refused to admit the same in evidence and an exception was taken. The document is as follows:

"IN THE ORGANIZATION OF THE PUBLIC TRUST & SAVINGS

BANK OF CHICAGO.

I desire to become a stockholder in the PUBLIC TRUST AND SAVINGS BANK OF CHICAGO to be organized under an Act of the State of Illinois 'concerning Corporations with Banking powers' with a capital stock of Three Hundred Thousand Dollars ($300,000) and a surplus fund of Sixty Thousand Dollars ($60,000).

I hereby subscribe for Twenty (20) shares of the Capital Stock of the said Public Trust and Savings Bank of Chicago, at One Hundred and Twenty-five Dollars each and agree to pay for same as follows: (10%) to accompany this subscription and the balance on or before demand is made by the Directors to be elected by the subscribers.

It is understood and agreed that the sum of ([illegible]) a share of the above number of shares herein subscribed for is to be used to defray organization fees and expenses.

Chicago, April 19, 1913.

(Signed) SIDNEY A. DAVID."

The defendants Hart and Thompson also sought to introduce in evidence an agreement made by the defendant May for a lease of certain premises, to be used by the bank when finally organized, and to show the expenditure of certain moneys in order to secure said lease, but the court would not allow said agreement to be introduced or said expenditures to be shown, and defendants excepted. The court also declined to permit

defendants to show for what purpose the checks for $625 and $25, previously referred to, were drawn, and defendants excepted.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Inasmuch as we have reached the conclusion that the judgment should be reversed and the cause remanded for a new trial we deem it unnecessary to discuss all the points urged by counsel for defendants as grounds for a reversal of the judgment.

One of the points urged is that the trial court erred in refusing to admit certain evidence offered on behalf of the defendants, viz, in refusing to admit the document signed by the plaintiff on April 19, 1913, at the time he gave his check for $250 to the defendant May, and in refusing to admit evidence tending to show the disbursement of certain moneys for expenses in the organization of the bank. From said document it appears that plaintiff was desirous of becoming a stockholder in the Public Trust and Savings Bank "to be organized" with a capital stock of $300,000 and a surplus fund of $60,000; that plaintiff subscribed for 20 shares of said stock at the price of $125 each ($2,500 in all); that plaintiff agreed to pay 10% of his subscription ($250) at once, and the balance on or before demand made by the directors; and that plaintiff in making said 10% payment on his subscription "understood and agreed" that the sum of $5 a share on said 20 shares (or $100) "is to be used to defray organization fees and expenses." The evidence disclosed that at the time plaintiff paid $250 on his subscription and made said agreement the defendants May, Hart and Thompson were acting as commissioners in the organization of said bank, and that at the time of the commencement of plaintiff's tort action, February 11, 1914, said bank had not been organized. Plaintiff alleged in his statement of claim that the defendants had

converted said sum of $250 to their own use, which sum they and each of them had refused upon demand to return to plaintiff, and further alleged in substance th t the defendants fraudulently and falsely represented to plaintiff that the organization of the bank would be completed and stock issued to plaintiff not later than July 1, 1913, but that the defendants had failed to organize said bank and had failed to issue said stock. The defendants Hart and Thompson in their affidavits of merits denied that they had converted said $250, or any part thereof, to their own use, and the evidence does not disclose that any portion thereof was ever used by them for their own personal benefit. Plaintiff testified that he never had any conversations with Hart or Thompson and that neither Hart nor Thompson ever made any representations of any kind to him. And while it appears from plaintiff's testimony that he demanded of May the return of said $250 if the organization of the bank was not completed by August 1, 1913, it does not appear that any demand for the return of said $250 was made, prior to the commencement of the suit, upon the defendants Hart and Thompson, or either of them. After careful consideration of all the evidence we are of the opinion that the trial court committed error prejudicial to the defendants in not admitting said document, signed by the plaintiff and dated April 19, 1913, and in not admitting other evidence offered by defendants tending to show the disbursement of certain moneys for organization expenses. We think that the document showed an agreement on the part of plaintiff to allow the defendants to use the portion mentioned of plaintiff's subscription in defraying organization expenses, and also tended to show, in connection with other evidence offered, that defendants were not liable to plaintiff in any form of action to the amount of the judgment rendered against them. In 10 Cyc. 265 it is said: "A person who h s paid money for shares in a company which never comes into existence * * has paid it on

a consideration which has failed, and he may recover it back in an action at law as so much money had and received to his use, unless it can be shown that he has consented to or has acquiesced in the application of the money which those into whose hands it has come have made of it."

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

41 - 20798

J. A. SVENSON, Defendant in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
GEORGE C. STAMM, HENRY STAFFORD and NILS A. SUNDHOLM, Plaintiffs in Error.	

195 I.A. 554

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse a judgment of the Municipal Court for $550, entered July 1, 1914, in favor of J. A. Svenson, plaintiff, and against George C. Stamm, Henry Stafford and Nils A. Sundholm, defendants.

The action was commenced April 6, 1914, against George C. Stamm, Edith M. Stamm, Henry Stafford and May Stafford. In his statement of claim plaintiff alleged that his claim was for $550, and was "for balance owing on fifteen (15) flights of main stairs placed in building at No. 912-932 Airdrie Place, Chicago." An authorized agent of the four original defendants filed an affidavit of merits in their behalf in which it was denied that any balance on said stairs was due to plaintiff from them or any one of them. On May 27, 1914, on motion of plaintiff, the court ordered that all records, papers and proceedings be amended by making "Carl A. Rydquist and Nils A. Sundholm, doing business as Rydquist & Sundholm, co-defendants herein." Subsequently both Rydquist and Sundholm were duly served with process and each entered a separate appearance. Rydquist filed an affidavit of merits in which he denied owing any sum of money to plaintiff, and alleged that he had never purchased any stairs from plaintiff, that he had not been a partner with

Sundholm since some time in May, 1913, and that plaintiff had had notice that he was not a partner with Sundholm when he (plaintiff) sold the stairs in question to Sundholm. On June 15, 1914, Sundholm was defaulted for failure to file an affidavit of merits. At the commencement of the trial, July 1, 1914, which was before the court without a jury, plaintiff voluntarily dismissed the suit as to defendant Rydquist; and during the trial the court dismissed the suit as to the defendants Edith M. Stamm and May Stafford.

At the conclusion of all the evidence the defendants, George C. Stamm and Henry Stafford, moved that the court dismiss the suit as to them, which motion the court overruled and said defendants excepted. The court thereupon found the issues against the defendants Stamm, Stafford and Nils A. Sundholm and assessed plaintiff's damages at the sum of $550, and, after overruling motions for a new trial and in arrest of judgment, entered judgment on the finding against said three defendants.

The evidence disclosed in substance the following facts: The premises and building at Nos. 912-932 Airdrie Place, Chicago, were in May, 1913, owned by the four defendants, George C. Stamm and Henry Stafford and their respective wives, and they continued to be the owners up to the time of the trial. The defendants George C. Stamm and Henry Stafford were partners, and they entered into a contract for the erection of a building upon said premises with the Rydquist & Sundholm Company, which was then a partnership, composed of Carl A. Rydquist and Nils A. Sundholm. On May 16, 1913, after the making of the original contract, plaintiff, who was in the business of manufacturing stairs, entered into a sub-contract in writing with said Rydquist & Sundholm Company, wherein he agreed to furnish and set up in said building 15 flights of

main stairs, according to certain plans and specifications, for the sum of $1150. A few days after the signing of said sub-contract plaintiff informed Henry Stafford that he had made such contract, that he did not think said company was financially responsible and that he was not satisfied to go ahead with the contract. According to plaintiff's testimony Stafford replied: "I am going to superintend the job myself. You go ahead and do the work. I will take care of you. I will see that your money is paid." About June 1, 1913, according to the testimony of two sons of plaintiff, after the stairs were ready for delivery, Stafford called at plaintiff's place of business to inspect the stairs, and upon one of the sons expressing doubt as to the financial responsibility of said Rydquist & Sundholm Company, Stafford said, "Your money will be taken care of. I will hold out your money, and see that it is paid to you." Stafford denied that he ever told plaintiff or any of his representatives that he would personally guarantee plaintiff's account for the stairs or would "hold out" any money therefor. About July 24, 1913, after the stairs had been delivered at the building, one of plaintiff's sons called on Stafford and asked for a payment on account. According to the son's testimony, Stafford said that he should "get an order from the Rydquist & Sundholm Company," and that the most he (Stafford) could pay at that time was $600. The witness procured such an order and the same was introduced in evidence. It is dated July 24, 1913, is signed "Rydquist & Sundholm Co., W. A. Sundholm," and is addressed to "Stafford & Stamm." In the body of the order are the words, "Please pay to the order of Jos. Svenson the sum of $600 and charge to my account." Below the signature are the words: "Paid $600. J. A. Svenson, by Erick Svenson." After the work of setting up the stairs in the building had been fully completed, one of the sons of

plaintiff again called on Stafford and asked for the balance due, $550, on plaintiff's work, and Stafford said that the work was satisfactory and suggested that said son call upon Stamm relative to Stamm and Stafford and their respective wives giving to plaintiff a note for said balance. Said son thereupon called upon Stamm and presented him with an order for $550 from Rydquist & Sundholm Company, and asked for payment. Some conversation was had regarding Stamm and Stafford and their wives giving plaintiff a note for said balance, and Stamm finally said that he would later advise plaintiff as to what they would do. No note was ever given plaintiff. Subsequently plaintiff served sub-contractor's notices of a mechanic's lien, dated October 20, 1913, on Henry and May Stafford (whether served on the Stamms does not appear), claiming a lien on said premises and building for the material and labor for constructing said stairs, and that there was due plaintiff "on the 23rd day of August, 1913," the sum of $550 therefor. A certified copy of the records and proceedings in a certain garnishment suit in said Municipal Court, case No. 280,299, was introduced in evidence. It therein appeared that on April 20, 1914 (after the present suit was commenced), the Columbia Cabinet Company, an Illinois corporation, recovered a judgment in said court for $1,007 against "Nils A. Sundholm and Carl A. Rydquist, doing business as Rydquist-Sundholm Company"; that a garnishee summons was issued for said Henry Stafford and George C. Stamm, and others; that on May 14, 1914, said Stafford and Stamm, as garnishees, filed a joint answer, verified by affidavit, in which they admitted having in their possession money, to the amount of $356.30, due and owing said Rydquist-Sundholm Company, for balance under a certain contract for the erection of a certain building, which amount was subject to the order of the court, and alleged that said money was

claimed by "J. A. Svenson," and others (naming them), and asked that said adverse claimants appear, etc.; that subsequently plaintiff entered his appearance in said garnishment suit; and that on May 27, 1914 (before the judgment in the present suit was entered), the court adjudged that "judgment be entered on the finding as to the claim of the Columbia Cabinet Company, to the fund in the hands of the garnishees, and that the right thereto is in the Columbia Cabinet Company."

In view of the evidence in the case, we think that the trial court erred in entering a joint judgment for $550 against the three defendants, George C. Stamm, Henry Stafford and Nils A. Sundholm. While there is evidence tending to show that the defendant Henry Stafford, prior to the furnishing of the stairs to the building by plaintiff, verbally promised plaintiff that he, personally, would pay for said stairs, the making of such a promise is denied by Stafford, and, even if he made it, the evidence does not disclose sufficient facts showing that this promise was binding on Stamm so as to make him jointly liable with Stafford. Neither does the evidence, in our opinion, disclose sufficient facts showing that the defendant Nils A. Sundholm was jointly liable with both Stafford and Stamm. And there is nothing in plaintiff's statement of claim indicating that plaintiff, as a sub-contractor, was seeking to obtain a judgment against the owners of the building and the original contractors, jointly, under section 28 of the Mechanic's Lien Act, and the proof does not disclose that plaintiff is entitled to a mechanic's lien in the sum of $550. Furthermore, the judgment is not against all the owners and both original contractors.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

620 - 20958

THOMAS MAC LAGAN, Appellee, vs. CHICAGO TELEPHONE COMPANY, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

STATEMENT OF THE CASE. This is an appeal from a judgment for $7,000 rendered in the Circuit Court of Cook County, April 25, 1914, in favor of Thomas Mac Lagan, plaintiff, and against the Chicago Telephone Company, defendant, in an action for damages for personal injuries. The accident happened about noon on March 3, 1910. Plaintiff, an employe of defendant, fell from a telephone pole to the ground and suffered severe injuries.

The declaration as originally filed consisted of two counts. During the trial the plaintiff voluntarily dismissed the second count. It was alleged in the first count in substance that on March 3, 1910, the defendant was possessed of certain telephone poles which it had erected in various streets and alleys in the city of Chicago and upon which were divers arms, brackets and braces; that one of said poles was in the alley extending south from Haveland avenue and near Herndon streets; that plaintiff was a servant of defendant as a repair man and was working upon said pole and around a certain one of its arms and certain braces and brackets attached thereto; that defendant had negligently kept and maintained one of the foot braces in a defective state of repair, in that "the said brace was loose, and the bolts, nuts and threads on the same were old, rusty, decayed and loose and insufficient"; that defendant well knew, or in the exercise of ordinary

care might have known, of said condition and that the "plaintiff did not know of the condition of said appliances as aforesaid, and did not have equal means with the defendant of knowing of said condition, and did not know of or appreciate the danger of working at or about said appliances in said condition"; that, while plaintiff with all due care was endeavoring to repair a certain wire near said appliances and at a height of about 25 feet from the ground and had placed one of his feet upon said brace, and in consequence of the said negligence of the defendant, "the said brace came loose and the plaintiff was thereby then and there caused to fall from the said pole and brace to and upon the ground," and was severely injured, etc.

The evidence discloses in substance the following facts: At the time of the accident plaintiff was about 26 years of age and was employed by defendant as a telephone repairman in the Lake View district. He was also called a "combination repairman," a "trouble shooter" or "trouble chaser." He had been employed by defendant for about 6 years. He first worked for the defendant during the year 1901, engaged in placing telephone instruments and wires inside of subscribers' premises. He then left defendant's employ and successively worked for two other concerns installing switchboards in telephone exchanges. For about 6 months he was in charge of the office of a telephone company in Indiana, taking care of the switchboard. In 1905 he returned to defendant's employ as an installer of telephones. Shortly thereafter he began working as a repairman, or "trouble chaser," and continued in this capacity for about 5 years up to the time of the accident. Intermittently and for short periods of time he worked inside the Lake View office as a tester and making repairs in the office. His work as a repair man consisted in examining and

making repairs to all kinds of telephone equipment, including telephone instruments, and the wires and appliances connected therewith, and poles, cross-arms, buck arms, pins and cable boxes. For about a year prior to the accident he at various times also acted as a special inspector. This work was of the same character as that of a "trouble chaser," except that it required more careful attention. He was given this work because of his superior qualifications. A repairman generally worked alone. If the situation was such that one man could not handle it he notified the office either by telephone or by mailing a written recommendation as to the repairs needed on blanks furnished by the company in book form and carried by him. His duties necessarily required the frequent climbing of telephone poles, and for this purpose he always carried a pair of spurs. Plaintiff testified he commenced to do "pole work" in 1906, and from that time on he climbed poles whenever it became necessary for him to do so in the course of his search for trouble. Defendant had three departments of work - the construction department, the installation department and the maintenance department. The construction department had charge of the building of the outside plant from the exchange to all subscribers' premises, the putting up of poles, conduits, wires, etc. That department also had charge of the heavy repair work, i. e., work which required gang organization rather than an individual to take care of it. The installation department installed the telephones in the premises of a subscriber. The maintenance department, in which plaintiff was employed, was responsible for the clearing of all trouble and all defects in the plant that affected the service, such as switchboard trouble, instrument trouble, cable trouble, or line trouble. Plaintiff testified that his work "involved a particularly careful inspection of the line and the instrument and everything connected with it; * * it also involved pole

climbing; * * it was part of my work to go out and find what was the nature of the trouble." It was also disclosed by the evidence that the combination repairmen were directed to report all difficulties and defects and to make inspection of the poles and lines, and that defendant had no general system of inspection of the poles, lines, cross-arms, braces, etc., other than that made by the repairmen and construction men.

On the morning of the accident plaintiff was sent to the residence of a subscriber, at No. 3627 North Herndon street, to ascertain the cause of a "can't be heard" complaint recently received. Finding that the difficulty was not in the telephone or in the wires on the subscriber's premises, plaintiff found it necessary to climb several poles in the alley, running north and south, in the rear of said premises. He climbed a pole, referred to as "pole No. 1," north of the "junction" pole, and ascertained that the trouble was to the north. He then approached "pole No. 2," north of said junction pole, and climbed up the south side of the pole from which he afterwards fell. This pole was about 30 feet high, and carried certain equipment both of the defendant and the Commonwealth Edison Company. The latter company's wires were strung on a cross-arm near the top of the pole. Some distance lower were the wires of defendant, suspended on another arm, known as the "alley arm," which was about 15 feet from the ground. This arm was of wood and extended at right angles to the pole out over the alley way. It was about 8 feet long, 4 inches across and 5 inches through, and was set into the pole in what is called a "gain," i. e., a flat surface cut in the pole, and was fastened to the pole by means of a long bolt running through the pole and secured by a nut. The outer end of the pole was supported by a galvanized iron bar, called a "knee brace," about 8 feet long. The lower end of this brace was securely fastened to

the pole by large screws. The upper end was attached to the arm by means of a bolt, running through the brace and arm and, normally, firmly secured by a nut. About midway on the brace was a projection or step, where an employe working upon the pole might put one of his feet and rest his weight. There were from 6 to 10 telephone line wires running north and south in the alley. These were attached to pins, covered by glass insulators, on the top of the alley arm. A short distance above this arm was another similar arm, called the "buck-arm," attached to the pole, from which arm "drop wires" extended to the subscribers' residences in the immediate vicinity. The buck-arm was placed at right angles to the alley arm for the purpose of keeping the drop wires the necessary dis ance apart. Running along the under side of the alley arm were several flexible wires, called "jumper wires" or "jumpers." These connected the main telephone wires, running north and south and attached to the alley arm, with the drop wires attached to the buck-arm and running therefrom to the subscribers' premises. Just east of the buck arm and about one foot above the alley arm was a cable box, in which were numerous small wires arranged upon a rack so as to be easy of access. As to what he did just prior to the accident and how the accident happened, plaintiff testified in part as follows:

> "I went up the pole. * * There was a cable box on the pole. * * I made a test from the box to get a line on the jumper, that line that this was working on. That was the first thing that I did. I reached that box from the south side of the pole. I was up to a point where my head and shoulders were even with the box, so I could look in the box. I opened the door of the box when I made the test. My feet were both on the pole, spurred into the pole. Up to this time I had not come in contact with or touched this knee brace or this alley arm. I traced these jumpers down from the wire which led to the line in trouble. * * In tracing jumpers you get hold of that one wire, and you have to follow that wire where it goes; it would be under cleats, and you would have to pull even between each cleat or at the end of the arm, back wherever it went. After I made this test out of this box and began to trace the jumper, I then changed my position. I found it necessary to get out under the arm. I had to have my two hands free, because in pulling the jumper from one place to another I had to have both

hands free so I would be sure not to lose the wire. I spurred my left foot into the pole and placed my right foot against the step in the middle of the knee brace, and stooped to a position so that I could see under the arm. * * The distance was somewhere around three feet from the step in the middle of the brace to the cross-arm above. The distance between my spur where I stuck it into the pole and the bottom of the cross-arm was about three feet. * * Up to the time I assumed this position I had not noticed anything movable in connection with either the parts or the arm of the pole. I had not had hold of the arm. After that I did nothing more than trace a line underneath the arm that runs in cleats, known as the jumper. * * I kept going further out on the arm to test it. * * I brought pressure to bear on the side of the brace where my right foot was and it gave way to the north, and, the spring jarring my left foot out of the pole and not having anything below to catch, I lost my balance and went over backwards off the pole. I couldn't tell you how much of a give or spring or movement there was. It seemed to get away from me entirely. * * I lay unconscious for a little while. * * Before that movement came, I had not seen or noticed anything loose or moving in the knee brace or any part of the pole or equipment there."

On cross-examination plaintiff further testified that his work as an outside repairman required him to climb poles in order to repair burnt fuses in the cable boxes, to shake out tangled wires, to look out for the clearance of wires and to trace jumpers. Referring to the work of tracing jumpers he testified: "In doing that I not only had to climb the pole, but sometimes I had to get out on the outer end of the cross-arm to reach the point where the wire in question was attached. All these things were of frequent occurrence.

One of plaintiff's witnesses, who examined the brace and alley arm the day following the accident, testified to the effect that he found that the brace, where it was connected with the alley arm, was loose, and that there was a play from one-half inch to an inch between the brace and the arm because the nut on the bolt lacked that much of being turned up. There was other testimony offered by plaintiff to the effect that the through bolt fastening the alley arm to the pole was loose and that the arm swayed to the north and south a little. The court, however, finally instructed the jury that, as the declaration did not charge that plaintiff's injury was causedby any in-

security in the fastening of said arm to the pole, plaintiff was not entitled to recover for injuries caused by such insecurity. The evidence offered by defendant tended to show that plaintiff's fall was caused by his slipping from the step on the brace because of the muddy condition of his shoes and because of the crouching position he took at the time without making use of either of his hands in supporting himself. The defendant also introduced testimony to the effect that after the accident and on the same day plaintiff stated to several persons that his fall was occasioned by his foot slipping owing to the mud on his shoes; that subsequently he stated to a representative of the defendant that the brace was loose and the nut on the bolt which secured the brace to the alley arm was unscrewed; that upon an examination then being made it was found that the space of about one-half inch on the bolt between the arm and the nut was of a brighter color than the rest of the bolt, thereby indicating that said nut had been recently unscrewed, but that the pole and the equipment thereon was otherwise in good condition, and that said brace, with no weight upon it, could be moved back and forth about one-half inch at the place where it was attached to the arm, but that when one was standing on the step in the middle of the brace it could not be moved as the iron would not slide over the threads of the bolt.

At the conclusion of plaintiff's evidence and again at the close of all the evidence the defendant moved for a directed verdict in its favor, but the motions were denied and the defendant excepted. The jury found the defendant guilty and assessed plaintiff's damages at the sum of $7,000, upon which verdict the judgment appealed from was entered.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant that the trial court erred in refusing to direct a virdect in defendant's favor and in entering judgment for plaintiff, upon the grounds that the evidence shows that plaintiff was guilty of contributory negligence and that he assumed the risk of the injuries he received. In the view we take of this case, after a careful examination of the somewhat voluminous record, it will not be necessary for us to consider the other points urged by counsel as reasons for a reversal of the judgment.

In Goldie v. Werner, 151 Ill. 551, 556, it is said: "The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: 1st. That the appliance was defective; 2nd. That the master had notice thereof, or knowledge, or ought to have had; 3rd. That the servant did not know of the defect, and had not equal means of knowing with the master." This rule has been repeatedly approved and is the well settled law of this state. (Howe v. Medaris, 183 Ill. 284, 290; Armour v. Brazeau, 191 Ill. 117, 126.) And it has been decided that a telephone pole is an appliance for the support of the wires and that to reach the wires a lineman uses the pole as he might a ladder or a scaffolding. (Britton v. Central Union Telephone Co., 131 Fed. Rep. 844, 845.) It was charged in the one count upon which the case was tried that the brace, which supported the alley arm at its outer end, was defective and insecure. Assuming for the sake of the argument that when plaintiff climbed the pole this was so (concerning which the evidence is very conflicting), and further, assuming that the defendant, as charged in the count, should in the exercise of ordinary care have known of the defect (to support which material allegation there is little, if any, evidence in the record), we are of the opinion that the evidence clearly discloses that

plaintiff had at least equal means with defendant of knowing the condition of the brace and arm. He was an experienced repairman, or "trouble chaser," accustomed for over four years to climbing and working upon poles and cross-arms. He knew it was dangerous to support his weight upon an insecure brace or arm 18 feet from the ground. He testified in substance that he first supported himself by having both feet "spurred into the pole"; that when he changed his position, spurring his left foot into the pole and placing his right foot on the step in the middle of the brace; that up to the time he took this second position he "had not noticed" that either the brace or arm was movable, and had not had hold of the arm; that in order to do the work of tracing the "jumper wires" on the under side of the arm he assumed a crouching position using neither hand to assist in his support; that suddenly there was a give or movement of the brace and he lost his balance and fell; and that before the movement came he "had not seen or noticed anything loose or moving in the knee-brace" or any part of the pole or equipment. If the accident happened because of the loose condition of the brace, as charged, at the point where the brace was attached to the arm, it does not appear from plaintiff's own testimony that he exercised due care for his own safety before taking the position he says he was in at the time of the accident. He should have "noticed" whether or not the brace and arm were in a secure and safe condition, particularly as the work of tracing the jumper wires required, as he says, the free use of both hands. He had every opportunity of making the necessary observations and tests. In the language used by the court in Roberts v. Missouri & Kansas Telephone Co., 166 Mo. 17, 64, "he took absolutely no precautions for his own safety. His knowledge and means of knowing the condition of the cross-arm was not only equal but superior to the knowledge and means

of knowledge of its condition by the master. He was on the spot; the master was in town in the office." (See, also, Johnston v. Syracuse Lighting Co., 193 N. Y. 592; Goddard v. Interstate Telephone Co., 56 Wash. 536.) And we think that plaintiff in this case is not entitled to recover any sum of the defendant because of his contributory negligence.

And we are of the opinion that under the facts in evidence the plaintiff must be held to have assumed the risk. (DeFrates v. Central Union Telephone Co., 248 Ill. 356, 361.) Counsel for plaintiff attempt to draw a distinction between a "lineman," such as the plaintiff in the case last cited was, and such a "repairman" or "trouble chaser" as was plaintiff in the present case, but the distinction is not apparent to us. The gist of the decision in the DeFrates case is, as we read it, that an experienced employe, who is required frequently in the course of his duties to climb poles and who is fully acquainted with the dangers incident to the work, is as well able to discover and guard against defects and dangers as separately employed inspectors would be, and that in the absence of a system of separate inspection, upon which the employe has a right to rely and does rely, he assumes the risk of the defects and dangers which he might have discovered himself by reasonable inspection. Counsel for plaintiff further contend that the evidence shows that the defendant to the knowledge of plaintiff did maintain just such an independent system of inspection of the poles and equipment thereon. We cannot agree to this. We think the evidence shows just the contrary, and that all repairmen or "trouble chasers," including plaintiff, knew that they must rely upon their own inspection of the poles and equipment thereon. In this connection the following cases may be cited: Peoria Electric Co. v. Gallagher, 68 Ill. App. 248; Ewald v. Michigan Cent. R. Co., 107 Ill. App. 294, 296; Bias v. Consolidated Lighting Co., 73 Vt. 35, 38;

Roberts v. Missouri & Kansas Telephone Co., 166 Mo. 3[illegible]; 383; Consolidated Co. v. Chambers, 11[illegible] Ind. 324, 3[illegible]4; Lynch v. Saginaw Valley Traction Co., 1[illegible] Mich. 174, 177. In Taylor v. Centralia Coal Co., 1[illegible] Ill. App. 324, 330, it is said: "Where the duty of inspection, as in this case, is imposed upon the employe and accepted by him, and the duty of inspection is simple and plain, * * and the employe is clearly competent to make the inspection, the employer is clearly relieved from any duty to inspect, and consequently cannot be liable for a failure to make such inspection."

For the reasons indicated the judgment of the Circuit Court of Cook County is reversed.

[illegible].

FINDINGS OF FACT. We find as ultimate facts in this case that the plaintiff, Thomas Maclagan, assumed the risk of the injuries he received as incident to his employment, and, further, that he was himself guilty of negligence which contributed to his injuries.

638 - 20976

GEORGE F. HARDING, JR., Appellant,	)	APPEAL FROM
	)	SUPERIOR COURT
vs.	)	COOK COUNTY.
CHRISTOPHER BRAY, Appellee.	)	

195 I.A. 561

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 7, 1910, George F. Harding, Jr., filed his bill of complaint against Christopher Bray, defendant, in the Superior Court of Cook County. The bill alleged, in substance, that on and prior to December 1, 1902, complainant was and now is the owner in fee of certain vacant and unimproved premises (describing them) situate in Cook County, Illinois, and that during all of said period he has been and now is entitled to all the rents and income therefrom; that the defendant, wrongfully and fraudulently assuming to have the power so to do and without any rights in the same, has during all of the period subsequent to December 1, 1902, leased said premises, without the knowledge or consent of complainant, to various parties unknown to complainant and for sums unknown to complainant, and has wrongfully collected and converted to his own use the various sums thus wrongfully obtained by him as rent for the same; that complainant has been unable, after diligent inquiry, to ascertain to whom the premises were so leased by the defendant or the amount which defendant has so wrongfully received and converted to his own use, but complainant believes and charges that defendant has received in the aggregate more than the sum of $1,900; that complainant believes and charges the fact to be that defendant from the sums so wrongfully obtained by him has purchased certain other

premises (describing them) in said Cook County, which said other premises belong in equity to complainant, and that defendant has no other property subject to execution or attachment or garnishment, or out of which any decree entered herein in favor of complainant may be satisfied; and that complainant had no knowledge of said wrongful acts of the defendant prior to April 6, 1910, and that all rights of action of complainant against defendant have been wrongfully and fraudulently concealed from complainant by defendant. The bill prayed that the defendant might be required to answer the same (defendant's oath to the answer being waived), that defendant might be required to discover and set forth the various parties to whom said first mentioned premises were leased by defendant, the time which each of the parties occupied the same, the amounts received from said parties, and the dates of the various payments therefor, that said defendant might be enjoined from selling, incumbering or otherwise disposing of the premises so purchased by him, that a receiver thereof might be appointed, that an accounting might be taken in this behalf by and under the direction of the court, and that defendant might be decreed to pay complainant whatever sums might appear to be due complainant, etc.

To this bill the defendant on June 27, 1910, filed a general demurrer. On March 17, 1913, on motion of the solicitor for defendant, the court ordered that said demurrer be sustained and that leave be granted complainant "to amend his bill of complaint within ten days or stand by his bill of complaint." On February 28, 1914, both parties appearing, the court entered an order to the effect that, the court having previously sustained defendant's general demurrer to said bill, and complainant now electing to stand by his said bill as against said demurrer, "it is ordered that said bill of complaint be and the same is

hereby dismissed at complainant's costs." To the entry of this order complainant objected and prayed and perfected this appeal.

Counsel for complainant contends that the bill is good on general demurrer and that the court erred in sustaining such a demurrer thereto and in dismissing the bill at complainant's costs. No brief has been filed in this court by the defendant.

We are of the opinion that the bill on general demurrer is sufficient to require an answer by the defendant, and that the court erred in sustaining the demurrer and dismissing the bill. The order or decree of the Superior Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

668 - 21006.

FRANK P. ILLSLEY, Appellee,	)	
	)	Appeal from Circuit Court, Cook County.
vs.	)	
PEERLESS MOTOR CAR COMPANY, Appellant.	)	

195 I.A. 572

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 9, 1906, Frank P. Illsley, plaintiff, commenced a suit in the Circuit Court of Cook County against the Peerless Motor Car Company, defendant, a corporation with principal office at Cleveland, Ohio, upon a written contract executed by the parties on October 10, 1903, to recover "commissions" on the sale of two automobiles manufactured by defendant. The first trial before a jury resulted in a verdict and judgment against defendant for $2,039, but on appeal to this court the judgment was reversed and the cause remanded. (Illsley v. Peerless Motor Car Company, 177 Ill. App. 459.) By the terms of said written contract plaintiff was made the "exclusive agent" of defendant until November 1, 1904, for the sale of its motor cars "in the territory included in State of Illinois north of a line drawn east and west through the City of Vandalia, Ill., to a line east and west located 125 miles north and east of Chicago, with the exception of the City of Milwaukee, Wis., and State of Iowa east of a line drawn north and south through Des Moines." Plaintiff, in consideration of his appointment as such agent, agreed, among other things, to do all local advertising and conduct all local shows and exhibits at his own expense; to maintain proper salesrooms and repair and storage rooms at Chicago, Illinois; to carry in stock at all times at least one of the defendant's cars

for demonstrating purposes and one or more new cars for sale, together with reasonable supplies for repairs; and to order from defendant not less than twenty-five, 4 cylinder, 24 h.p. cars, to be delivered at stated times during a period of eight months from the date of the contract. Plaintiff was to be allowed a discount of 20% from defendant's list prices, as fixed from time to time, on all cars purchased from defendant. Plaintiff further agreed to devote his best energies to the sale of defendant's products, to refer promptly to defendant all inquiries received from territory other than his own, and not to sell or deliver any of defendant's products in any territory other than his own except by defendant's permission in writing, and plaintiff further agreed that neither he nor anyone for him should sell defendant's products at a price less than the list price at the time of such sale.

Plaintiff claimed that on January 19, 1904, while said contract was in force, defendant, either directly or through its agent at the city of Milwaukee, accepted an order for the sale and delivery of one of its automobiles or cars to Frank K. Bull, residing at Racine, Wisconsin (within plaintiff's exclusive territory), at the list price of $6,445, including certain extras, and that subsequently and while said contract was in force defendant sold and delivered said car to said Bull at said price at Milwaukee without plaintiff's consent; that about December 1, 1903, while said contract was in force, defendant without plaintiff's consent sold at Chicago, Illinois (within plaintiff's said territory), another of its cars to A. C. Banker, residing in Chicago, for the price of $3,750; and that by reason of said two sales plaintiff became entitled to "commissions upon said sales of 20% of the sums of money received for the same," which "commissions" defendant had refused to pay plaintiff. The award of the jury on the first trial, viz, $2,039, is 20% of the

aggregate amount of both of said sales.

On the former appeal, this court, on consideration of the evidence introduced at the first trial, decided in substance (1) that defendant, at least in making the sale to Bull, either directly or through its agent at Milwaukee, violated plaintiff's rights under the contract; and (2) that, while the right of plaintiff to recover nominal damages by reason of the breach by defendant of the contract was clearly established, there was no substantive evidence in the record to support a recovery of 20 per cent. of the sale price of the cars as actual damages. In discussing the second point this court stated, in substance, that the contract contained no provision for the payment by defendant to plaintiff of "commissions" upon cars, but contemplated that every such sale made within the designated territory should be made by plaintiff, and that plaintiff's profits should be the difference between the price at which he purchased and the price at which he sold; that, in the absence of proof of the existence of a uniform trade custom or usage, which entered into the agreement, to the effect that plaintiff was entitled to certain commissions upon all cars sold by defendant or its other agents within the designated territory, it was incumbent upon plaintiff, in order to entitle him to recover more than merely nominal damages, to prove that the sales in question could have been made by him if defendant or its agents had not made the same; and that the record did not contain any substantive proof of the evidence of such trade custom or usage, or any evidence tending to show that plaintiff had sustained actual damages by defendant's breach of the contract.

After the reversal of the former judgment by this court and after the cause had been re-docketed in the Circuit Court, plaintiff, by leave of court, on March 11, 1914, filed an

additional count to his declaration, which was similar to the special count originally filed except that it contained the further allegation that "there existed in the automobile trade at the time when said contract was entered into a certain uniform trade custom and usage, which entered into the aforesaid agreement, that an exclusive agent was entitled to commissions on all cars disposed of by the defendant either by itself or any other agent of the defendant within the territory in said contract described." To this additional count defendant filed a plea of the general issue, and two special pleas to the effect that the supposed cause of action did not accrue to the plaintiff (a) within 10 years or (b) within 5 years next before the filing of said additional count. To these special pleas plaintiff filed general demurrers and the demurrers were sustained.

The second trial was had before a jury, resulting in a verdict, March 25, 1914, against defendant for $1,985, upon which verdict judgment was entered, and defendant prayed and perfected this appeal.

We do not deem it necessary to pass upon the question whether or not, on the second trial, the evidence sufficiently showed the existence of a uniform trade custom or usage, which entered into the agreement, to the effect that plaintiff was entitled to commissions upon all cars sold by the defendant or its other agents within the designated territory. As we view it, the question is, under the contract and following the former decision of this court, did plaintiff on the second trial sufficiently prove that he could have made the sales to Banker and Bull, or to either of them, if defendant or its agents had not made the same? In other words, was there evidence tending to show that plaintiff had sustained actual damages by reason of defendant's breach of the contract in making said sales to

Banker and Bull or to either of them?

As to the transaction with Banker, the evidence disclosed that he was the sales agent of defendant prior to the appointment of plaintiff; that upon the termination of his agency Banker asserted a claim against defendant for damages because of his alleged wrongful dismissal and for a credit balance due him; and that this claim was finally settled by the delivery to him by defendant of a car, the list price of which was $3,750. While it appears that plaintiff complained to defendant that the delivery of a car to Banker would be detrimental to plaintiff's business, there is a sharp conflict in the evidence as to whether or not plaintiff did not finally assent to such delivery; and plaintiff testified: "I did not canvass Mr. Banker or attempt to sell him a car. I do not think I could have sold a car to Banker; * * * he was not a prospective customer in any way." In our opinion the evidence does not disclose that plaintiff sustained any actual damages by reason of the Banker transaction.

The substantial facts regarding the Bull transaction are stated in the former opinion of this court. (177 Ill.App.at page 462) and need not here be repeated. On the second trial, however, certain letters passing between plaintiff and Bull were introduced in evidence which were not in evidence on the former trial. From these and other letters and from all the evidence introduced on the second trial relative to the Bull transaction we are of the opinion that there was sufficient evidence tending to show that plaintiff could have made the sale of the car to Bull, at the price of $6,445, if defendant, either directly or through its Milwaukee agent, had not made the same, and to warrant the finding of the jury that plaintiff had sustained actual damages at the time of said sale, to the extent of 20 per cent. of said price, by reason of defendant's breach of said written

contract. In this connection the following cases may be cited: Schiffman v. Peerless Motor Car Co., 110 Pac. Rep. (Calif.App.) 460; Sparks v. Reliable Motor Car Co., 85 Kan. 29; Cofield v. Jenkins Motor Co., 39 So. Car. 419; Wier v. American Locomotive Co., 215 Mass. 303; Marshall v. Canadian Cordage Co., 160 Ill. App. 114.

Under the evidence it is difficult to account for the amount of the verdict rendered by the jury, viz, $1,985, except on the theory that the jury did not allow plaintiff any damages on account of the Banker transaction, but did allow plaintiff as damages on account of the Bull transaction 20 per cent. on said price of $6,445, or the sum of $1,289, plus interest thereon from the date the car was delivered to Bull and he paid said price. On this theory the verdict is slightly excessive. We think that the jury would be justified in allowing interest at the legal rate on said sum of $1,289 from said date. (Sec. 2, Chap. 74, Hurd's Ill. Statutes; A. B. Dick Co. v. Sherwood Co., 157 Ill. 325, 338; Meissner v. Stose, 131 Ill. 393, 397; Klein, etc., Ry. Co. v. Northwestern Bank, 165 Ill. App.35, 42; Thompson v. Frelinghuysen, 191 Ill. App. 204, 218.) Bull's written order for the car and certain extras at the price of $6,445 was dated January 19, 1904, and was addressed to defendant at Cleveland, Ohio. It was therein provided that the car was to be shipped to Milwaukee at Bull's risk on or about April 1, 1904, that Bull was to pay 10 per cent. of said price at the time of giving the order, and that the balance was to be paid "on delivery of car." Bull testified that the car was delivered to him at Milwaukee "sometime in May, 1904," and that he paid the Milwaukee agent of the defendant for it. The verdict was rendered on March 25, 1914. Interest at the legal rate on said sum of $1,289 from May 31, 1904, up to March 25, 1914, amounts

to $632.83, which added to $1,289 makes the total sum of $1,921.83. The verdict was $63.17 in excess of this total sum.

Our conclusion is that the judgment should be affirmed to the extent of $1,921.83. If, therefore, plaintiff files a remittitur in the sum of $63.17 within ten days the judgment of the Circuit Court will be affirmed for $1,921.83; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

676 - 21014

A. E. BOND and O. J. BOND, co-partners, doing business under the name of IDEAL SPRINING CO., Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
DUNTLEY MANUFACTURING COMPANY, a corporation, Appellant.	

STATEMENT OF THE CASE. This is an appeal from a judgment of the Municipal Court of Chicago for $2,428.83, rendered on June 5, 1914, in favor of appellees, plaintiffs in the trial court, against appellant, defendant in the trial court. The action was one of the first class, in contract, commenced July 10, 1913. Plaintiffs were manufacturers of metal goods. In their statement of claim, which was filed on the same day the suit was commenced, plaintiffs alleged in substance that their claim was for certain "air washer parts" manufactured for, and sold and delivered to, defendant on its order in November, 1911, and in January, 1912, amounting to $1,603.25, less a credit of $68 allowed by agreement, making the net sum of $1,535.25; that they also claimed said sum of $1,535.25 by virtue of an account stated on April 6, 1912; that in addition to said sum of $1,535.25 they had the further claim of $2,076, "for money due plaintiffs on air washer parts manufactured for defendant at its special request during the months of January, February and March, 1912," and the further claim of $127, "for money which plaintiffs were compelled to lay out in moving and storing the last described washer parts after the same were completed and tendered to defendant but which defendant refused to accept when so tendered,"

aggregating $2,203, less certain cash credits aggregating $600, leaving a balance due of $1,603; that they further claimed interest at the rate of 5% on said sum of $1,535.25 from April 6, 1912, amounting to $96.58, and interest on said sum of $1,603 less $137 from April 1, 1912, amounting to $94; and that their total claim against defendant including interest was $3,328.83.

The defendant filed an affidavit of merits in which it alleged in substance that as to said item of $1,535.25 the said air washer parts were not in accordance with the contract and specifications covering the same, were wholly unfit for the uses for which they were purchased by defendant, and had never been accepted or used by defendant, and that no account had ever been stated between the parties for any amount; and that, as to said alleged other claim of $1,603, "a large part of said air washer parts were never ordered from plaintiff by any authorized officer or agent of the defendant," and as to such parts as may have been ordered the same were never delivered to the defendant, and that the orders therefor were canceled long before the completion of any work done on such parts or any money laid out by the plaintiffs, and that defendant was under no liability for any services performed or money laid out by plaintiffs in completing the said orders which were so canceled by thedefendant.

Prior to the filing of said affidavit of merits the defendant moved that the court dismiss said suit because plaintiffs "have failed to file a declaration," as required by paragraph 7 of section 28 of the Municipal Court Act. On the hearing of the motion it was stipulated that certain rules, specifically relating to the practice in first class cases, had been adopted by the judges of said Municipal Court and were in force at the time of and since the commencement of the suit. The attorney for defendant objected to said rules

and to plaintiff's statement of claim filed in accordance therewith, upon the grounds (1) that said rules do not conform to the provisions of paragraph 9 of section 28 of said Act in that they do not provide that the practice in cases of the first class shall be the same as in the fourth class, but only that the pleadings shall be the same (Rule 14), and (2) that the practice in first and fourth class cases differs in many respects, as shown by the rules, and is not identical. The motion to dismiss the suit was denied and defendant was ruled to file an affidavit of merits within 15 days, and was granted leave to file a short bill of exceptions within 30 days. Subsequently, and within apt time as extended, the defendant filed its affidavit of merits above mentioned and also a short bill of exceptions.

The cause was tried before a jury. The following facts in substance were disclosed by the evidence: In May, 1911, plaintiffs commenced taking written orders from the defendant for parts for an air washer device then being marketed by defendant. These orders specified the kind, quantity and price of the parts. To fill the orders plaintiffs purchased the necessary raw materials and commenced on the work of manufacture. One of the orders for 200 sets of certain parts was raised by one of the plaintiffs, A. E. Bond, from 200 to 500 sets for the reason, as stated by him, that the purchasing agent of defendant, B. L. Ferguson, had verbally directed the increase in the order. Ferguson denied that he had ever authorized Bond to raise said order to 500 sets. Another written order given by defendant for 100 sets of certain parts was also raised to 200 sets by Bond, he claiming that he received verbal authority from the president of defendant so to do, and his testimony in this particular was not contradicted. Many of the parts mentioned in the various written orders received by plaintiffs had been manufactured and delivered,

and some paid for, and many other parts had been partially manufactured, when, in the latter part of August, 1911, Ferguson ordered plaintiffs to cease making further deliveries, to which order plaintiffs immediately objected on the ground that the goods were partially manufactured and plaintiffs had their money invested in the materials. According to the testimony of W. W. Bishop, then treasurer of defendant, he ordered Ferguson to stop further deliveries because plaintiffs had delayed certain shipments and because certain of the goods already delivered were "not in a salable condition," and "the finish was not up to standard." In December, 1911, plaintiffs turned the matter over to their attorney, Archibald Cattell, for adjustment, who, on December 8, 1911, wrote defendant a letter, making a demand for a settlement and saying, "I will be glad to take this matter up with your attorney or representative at your convenience"; to which letter defendant, by its treasurer, Bishop, replied on December 11, 1911, "the matter is referred to our general counsel, George S. Steere, the Rookery, Chicago." Cattell called on Steere, and Steere said that as he did not have time himself he would turn over the matter to H. F. Dodge, an assistant in his office, who would act in his stead. Cattell was introduced to Dodge, who stated that he would confer with Bishop and Ferguson, would familiarize himself with the situation and later have a further interview with Cattell. Dodge, shortly thereafter, went to defendant's plant and saw Bishop, who turned over to him certain correspondence between plaintiffs and defendant, certain books, written orders, and other papers, which he examined. Various conferences were thereupon had between Dodge and Cattell, resulting in the receipt by Cattell of a letter dated December 20, 1911, and written by defendant, by Bishop, treasurer, as follows: "At the request of our general counsel, we are reducing to writing the agreement

reached in re Ideal Spinning Company's alleged account, which we understand to be as follows: The Ideal Spinning Company are to complete unfilled orders on hand made out on our regular forms for air washer material which, when delivered and accepted, we are to pay for promptly on the regular commercial terms, thirty days net cash, deliveries to commence as soon as possible, - we reserving only the right to have the Ideal Spinning Company notify us at least 48 hours in advance of their commencing to make deliveries. Trusting that this arrangement is in accordance with your understanding," etc. This letter was shown to A. E. Bond, who objected to the limitation in the letter to orders made out on defendant's regular forms, as he claimed two of the unfilled orders had been verbally enlarged, as above mentioned. Cattell thereupon, on December 22, 1911, wrote defendant another letter in which he made mention of said two enlarged orders and made certain suggestions as to a settlement. Further conferences between Cattell and Dodge followed, and on December 30, 1911, they went over all the written orders together, and, at Dodge's request, Cattell on the same day wrote defendant another letter, in which he made an enumeration of all unfilled written orders, specifying the number of parts made and delivered on each and the number of parts remaining undelivered, and containing statements relative to said order for 200 parts as being raised with the consent of Ferguson to 500 parts, and to said order for 100 parts as being raised by the president of defendant to 200 parts. The letter concluded as follows: "If my proposition of the 22nd, as explained by this letter, is satisfactory, advise at once. It is absolutely necessary if we are to finish this work to hold our mechanics by notice to them today." Prior to January 11, 1912, Dodge and Cattell had another conference relating to an examination by defendant's men of certain parts on hand in plaintiff's plant. On January

11, 1912, Dodge reported to Cattell that such examination had been made, and on the same day, at Dodge's request, Cattell again wrote defendant a slightly modified proposition of settlement. The letter was signed "Ideal Spinning Co., by Archibald Cattell." On the morning of January 13, 1912, Dodge met Cattell at the latter's office. He brought with him a letter, dated January 13, 1912, addressed to plaintiffs, and a discussion relative to the terms thereof was had. Cattell telephoned Bond and Dodge telephoned Bishop. Dodge said that Bishop requested that defendant's note previously given plaintiffs for certain material should be extended if the proposition of settlement was to go through. As a result a post-script was added and the latter was signed by Dodge: "Duntley Mfg. Co., per E. V. Dodge." The letter is in part as follows:

> "Your letter of January 11th received, and we will accept the proposition in your letter with a few additions which are in the last two paragraphs, as follows:
>
> The Ideal Spinning Co. is to complete the manufacture and delivery of the following orders as quickly as possible and make delivery as fast as you can reasonably do so:"
>
> (Here follows a description of all the original written orders, showing parts delivered and to be delivered; (also showing order for 200 sets of certain parts as having (been raised to 500 sets, and also showing another order for (100 sets of certain parts as having been raised to 200 sets.)
>
> "These goods to be paid for in thirty days from delivery, net cash; you to give 48 hours notice before making delivery of the order.
>
> * * * * * *
>
> As agreed over the phone with Mr. Bond and Mr. Cattell, on this date, January 12th, the inspection of material as formerly when material was delivered to Chicago factory. Inspection now to be made at Erie, Pa. Also, material is to be F. O. B. cars Chicago.
>
> This letter is to supersede all former communications on the subject, and your acceptance of the terms in writing shall constitute a complete contract for delivery. The prices for the respective articles mentioned to be the prices fixed in the former order to which reference is made.
>
> P. S. It is also understood that you will renew $500 for 30 days of a note due Jan. 16th, 1912, for $600 and some odd dollars and cents."

On January 15, 1912, a letter, addressed to defendant,

was written by Cattell in the name of plaintiffs, in which said proposition was formally accepted. Immediately thereafter plaintiffs started to finish manufacturing the goods, and as fast as they were completed notified defendant of the dates on which they would make shipment to Erie, Pa. During January, 1912, plaintiffs made three shipments of goods to the Duntley Products Company at Erie, Pa., as requested. The invoices, however, were sent to the defendant for payment. The invoice value of the three shipments was $1,598, which, together with a balance of $5.25 claimed to be due for goods previously shipped to defendant, make the amount of $1,603.25, first mentioned plaintiffs' statement of claim. Ferguson, who went to Erie about January 1, 1912, and was superintendent of the Erie plant for several months, testified that when the first of said three shipments arrived the goods were found to be in such condition that they could not be used without being repaired, and defendant was so notified. Thereupon Bishop, treasurer of defendant, on January 25, 1912, wrote plaintiffs: "I think it would be well for you to withhold making further shipments until we have a report from the Duntley Products Company that they are accepting the material and approving your invoices as rendered. This may save all concerned unnecessary expense." Bishop also wrote the law firm of Steere, Williams & Steere (of which said George S. Steere was a member) for the "attention of Mr. Dodge," advising them of the complaints as to the goods and requesting them to take the matter up with Cattell. Thereupon several conferences were had between Dodge, Bond and Cattell relative to said complaints. On February 16, 1912, Cattell wrote defendant demanding payment for the first of the three shipments, which was made on January 17th, and was then due; and on February 27, 1912, he again wrote defendant demanding payment for the

last of said three shipments. Shortly thereafter he went to Europe leaving the matter in charge of an associate in his office, Dayton Ogden. No payments on said three shipments were made by defendant, and on April 6, 1913, Ogden, Bond, Dodge and Ferguson had a conference. According to Ogden's testimony Bond, at said conference, produced the invoices of said three shipments and all examined them, and both Ferguson and Dodge finally said that the figures shown as to the totals of the shipments were correct. Ogden further testified that the complaints about the goods were then taken up and discussed at length, and that subsequently Dodge wrote out a memorandum. This memorandum was introduced in evidence and identified by Ogden. On the first line was "$1603.25 delivered"; immediately below was "$68 repairs"; immediately belowwas the difference between the two amounts, "$1535.25," and still further below were the figures and words,"$500 cash; $500, 60 days; $500, 90 days." Ogden further testified that, as to the item "$1603.25 delivered," Ferguson and Bond both said at the time that was the total sum of the invoices on the goods shipped, and that, as to the item "$68 repairs," they both said that was the total amount of the allowance which was to be made on the goods shipped; and that Dodge said, as to the items "$500 cash, $500, 60 days and $500, 90 days," that these were the amounts and times that the sums were to be paid by the Duntley Mfg. Co. to the Ideal Spinning Co. Dodge testified that the memorandum was in his handwriting, that the first items referred to the shipments which had been made to the Duntley Products Co., and that the second item as to repairs was discussed at the conference. Bond testified that he received the memorandum from Dodge, that he agreed at said conference to allow the $68 for repairs, and that no further complaint as to the goods was made at the time. Ferguson testified that he did not remember that at said conference he and Bond agreed that it would cost $68 to put

the goods in proper condition. At this conference, according to Ogden's testimony, Ogden suggested to Dodge that some arrangement be made as to other goods manufactured and not yet shipped, but Dodge requested that no action thereon be then taken and the matter was left open.

No payments had been made by defendant when Cattell returned to Chicago early in May, 1912, and he immediately wrote Steere. Conferences between Cattell, Steere and Dodge followed. Steere suggested that an itemized list of all goods manufactured and still in plaintiff's possession, undelivered, be made up, and Cattell procured such a list from Bond, and on May 16, 1912, sent a copy to defendant and one to either Dodge or Steere. The total value of said goods was stated to be $1,923.20. The materials mentioned in said list corresponded exactly with an inventory made a short time before, at the request of defendant, by the witness Grimes, an employee of defendant. Cattell testified in substance that a few days after said list was made up he met Dodge; that Dodge said: "You have somewhere in your possession a statement of the amount which we agreed on was due you for the stuff shipped to Erie. We will pay you that amount if you will relieve us of the stuff you have on hand and sell it direct to the Duntley Products Co., or to someone else"; that he (Cattell) refused the proposition, but offered to try to re-sell the goods to the Duntley Products Co., provided it would not prejudice plaintiffs' rights against defendant; and that Dodge told him to go ahead and make the effort, that he (Dodge) was satisfied that defendant had to take the goods, but that if a sale could be made to the Duntley Products Co. plaintiffs would probably get their money quicker as defendant was hard up. Subsequently, on May 23, May 31 and June 7, 1912, defendant made three payments of $200 each to plaintiffs. Dodge requested that the

according

payments should be made "without prejudice." Accordingly, when made, plaintiffs signed receipts which contained a provision to the effect that the payment was made without prejudice to the rights of either party and should not be construed as an admission by defendant of any liability to plaintiffs.

Cattell was unsuccessful in his efforts to get the Buntley Products Co. to take the manufactured goods on hand and plaintiffs never received an order from that company. Cattell further testified, in substance, that on February 14, 1913, he had a further conference with Steere relative to the settlement by defendant of plaintiffs' claims; that he told Steere that he had several days previously made an appointment with Buntley, president of defendant, relative to a settlement, that Buntley had failed to keep the appointment, that upon inquiring the reason for the failure Buntley had said to him that "You don't need me, you and Steere fix the thing up," and that, therefore, he (Cattell) had called upon Steere for the purpose of effecting a settlement without a suit; that Steere then said, "There is no use of your starting any suit because we haven't any money; I am now selling some patents for these people in England; I expect a cable within a day or two that they are sold; just as soon as we get the money, you get your money"; that he (Cattell) replied: "What we want is money right away; the material tied up here is nearly all the capital Bond has"; that Steere thereupon said, "You write me a statement of exactly how much is due and I will * * pledge you my word when the money comes in on these patents you will be paid"; and that on February 25, 1913, Cattell wrote a letter to Steere. The original letter was introduced in evidence and is in part as follows:

"Pursuant to conversation the other day I beg to hand you the figures * * as follows:

To mdse. shipped to Erie on order of Duntley Mfg. Co. through your Mr. Dodge		$1,603.25
Manufactured goods on hand		2,076.70
		$3,679.95
On this there are the following credits:		
3 cash payments of $200 each	$600.00	
Allowance agreed upon between Bond and Dodge	66.05	668.05
		$3,011.90

The Ideal Co. has a charge against the Duntley Co. for storage from February 15, 1912, to date, together with a drayage charge of $15. * * In view of your expectation that the Duntley Co. will shortly be in a position to pay its debts, I suggest that the Duntley Co. should close this account by note, or some promise to pay, so that when they are in a position to pay, we will not have to litigate over again the question of the amount due."

No further payments were made by defendant, and on July 10, 1913, plaintiffs commenced the present suit.

Referring to the list, made in May, 1912, by Bond, of the then manufactured but undelivered goods, and which showed the total value to be $1,923.20, Bond testified that the prices set down on that list represented the fair and reasonable value of the goods. As to the discrepancy between the value stated on said list, $1923.20, and the value as stated in plaintiffs' statement of claim, $2076, Bond further testified that at the time the list was made out from 80 to 90% of the work on the goods had been completed and that additional work in completing some of the goods was thereafter done. He further testified that the undelivered goods have <u>some</u> market value but that "nobody can use them except the Duntley Mfg. Co."; that plaintiffs never made any formal tender of the undelivered goods to defendant after plaintiffs were directed by Bishop's letter of January 30, 1912, not to make any further shipments; and that plaintiffs stored the goods in a warehouse in Chicago and had paid one bill for storage and drayage amounting to $99, and had paid another bill for $41 for insurance. As reasons for not tendering said goods to defendant he testified on cross-examination as follows:

"I believe Mr. Cattell advised me to require the Duntley Mfg. Co. or the Duntley Products Co. to pay before we shipped any more goods, but that was not the reason we stopped the shipments. Mr. Dodge called us up on the 'phone and told us not to deliver any more goods, as he had a 'kick' on the goods shipped. * * That was the reason we didn't tender the shipment of any more goods. I believe we did offer to ship the goods listed in our letter of May 16, 1912. I went to Cattell's office and met Dodge, the three of us were in conference, and we offered to send the stuff down there, provided they would pay us for the stuff in advance. To a certain extent we were afraid of the credit of the Duntley Mfg. Co. at the time and that we would not get our pay for the goods if we shipped them, and I suppose that is the reason we didn't ship these goods."

The Court instructed the jury orally, and, on May 6, 1914, they found the issues against the defendant and assessed plaintiffs' damages at $2,428.35, upon which finding the judgment was entered.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is contended by counsel for defendant that the court erred in refusing defendant's motion that the suit be dismissed because of plaintiff's failure to file a declaration, as distinguished from a statement of claim. The action was one of the first class. Paragraph 7th of section 28 of the Municipal Court Act, relating to cases of the first class, provides that a plaintiff shall file his declaration within three days after the commencement of the suit, in default whereof the suit shall be dismissed unless the time for filing such declaration be extended. The plaintiffs in the present suit filed a statement of claim on the day the suit was commenced. In paragraph 9th of said section it is provided that the judges of said court may by rules duly adopted provide that the practice in cases of the first class shall be the same as in said act provided for cases of the fourth class. In section 40 of said act it is provided that every case of the fourth class, except certain mentioned suits, shall be commenced by the filing of a praecipe and a statement of plaintiff's claim. Of the rules duly

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adopted by the judges of said court and in force when the present suit was commenced, Rule 14 provides in part that in all cases of the first class the pleadings shall be the same as in cases of the fourth class, and Rule 15 provides in part that in first class cases the plaintiff shall file in lieu of a declaration a statement of claim. The argument is, as we understand it, that, while it is provided by said rules 14 and 15 that the pleadings in the two classes of cases shall be the same, still all the rules adopted by said judges disclose that the practice in cases of the first class is not the same as or identical with that in cases of the fourth class; that the said judges in adopting said rules have not followed the provisions of paragraph 9th of said section 28 with reference to the practice in cases of the first class, have exceeded their power, and said rules cannot supersede the positive provision of paragraph 7th of said section 28 which requires plaintiff to file a declaration; and that, hence, the trial court erred in refusing to dismiss the suit. We do not think that the conclusion follows. It has been several times decided that "pleadings" are included within the term "practice." (American Credit Co. v. Tamer, 170 Ill. App. 350, 354; City of Chicago v. Williams, 254 Ill. 360; Hall v. Federal Ins. Co., 158 Ill. App. 322.) The point made by counsel is that the plaintiffs did not file a proper pleading, but it is not contended that the rules adopted in relation to a plaintiff's pleading show that such pleading to be filed in a first class case is not the same as that to be filed in a fourth class case. Furthermore, it has been decided by this court that, by virtue of section 20 and paragraph 9th of section 28 of the Municipal Court Act, the judges of that court had a right to adopt a rule which provided for the filing of a statement of claim, instead of a declaration, in cases of the first class. (Muller v. Bernstein, 181 Ill. App.

154, 158.) We do not think that the trial court erred in refusing to dismiss the suit.

It is next contended that the trial court erred in admitting in evidence the testimony of the witness Cattell and other of plaintiffs' witnesses as to the admissions made by George S. Steere, general counsel of defendant, and by E. F. Dodge, and for the reason that an attorney at law cannot, outside of the trial of the case, make admissions contrary to the interest of his client. We think the evidence clearly shows that when the controversy first arose between the parties in December, 1911, George S. Steere, general counsel of defendant, was given general authority by defendant to settle the controversy; that he, in turn, with the acquiescence and approval of defendant, delegated that authority to E. F. Dodge, an assistant in his office; that on January 13, 1912, Dodge, with the approval of defendant, made a written proposition of settlement of the controversy to plaintiffs, which proposition plaintiffs accepted in writing; that subsequently plaintiffs shipped goods on defendant's account to the place as directed by defendant, to the value of $1,603.25; that on April 6, 1912, Dodge agreed on behalf of defendant with representatives of plaintiffs that on that date defendant owed plaintiffs the sum of $1,535.25 for said goods so shipped and that an account was then stated between the parties in such an amount; and that subsequently, during the latter part of May and prior to June 7, 1912, defendant made three payments to plaintiffs aggregating the sum of $600, and that no further payments were made by defendant. We cannot agree with counsel that the trial court erred as contended. "The law of principal and agent is generally applicable to the relation of attorney and client. The client is bound, according to the ordinary rules of agency, by the acts of his attorney within the scope of the latter's authority." (Weeks on Attorneys at

Law, sec. 216; 2 Wigmore on Ev., sec. 1078; Loomis v. New York, etc., R. Co., 159 Mass. 39, 44; 3 Am. & Eng. Ency. Law, 2nd Ed., 345.) And under the circumstances shown defendant was as much bound by the acts of Hodge as it would have been had those acts been done by Steere. (Lord, Owen & Co. v. Wood, 120 Iowa 303, 308.) Furthermore, there is abundant evidence tending to show that defendant acquiesced in and subsequently ratified the acts of Hodge. (Connett v. City of Chicago, 114 Ill. 7[illegible], 352; Wetherbee v. Fitch, 117 Ill. 67, 75.)

As to the second item mentioned in plaintiffs' statement of claim, viz, $[illegible],076. "For money due" plaintiffs for goods manufactured for defendant at its request but not delivered, it is further contended by counsel for defendant that no recovery can be had therefor because the evidence neither shows that plaintiffs tendered the goods nor that plaintiffs were excused from making a tender thereof. The evidence does not show that any formal tender was made by plaintiffs of any goods after the three shipments made in January, 1912. Counsel for plaintiffs contend that plaintiffs were excused from tendering the goods, because of the letter of January 25, 1912, received from defendant, and because Bond testified that Hodge directed plaintiffs by telephone not to ship any more goods. Defendant's letter of January 25th, 1912, was written immediately after the defendant's had received complaints from the Huntley Products Co. at Erie, Pa., as to the condition of some of the goods shipped in January to Erie, and the letter does not contain any positive direction not to ship any more goods but only directs plaintiffs to "withhold making further shipments" until defendant is advised by the Huntley Products Co. that it is accepting the goods and approving plaintiffs' invoices. Bond's testimony as to Hodge's telephone message should, we think, be considered in the same

light. After this letter and this telephone message were received the representatives of the parties had several conferences as to the complaints received concerning the goods shipped in January, 1912, and those complaints were finally adjusted on April 6, 1912, by the allowance by plaintiffs of the sum of "$68 for repairs" on their claim of $1,603.25 for said goods so shipped. It appears that about this time plaintiffs had on hand other goods, some completely manufactured and others partly manufactured for defendant, of the value of $1,923.20, and that plaintiffs' representatives had several conferences relative to the disposition of these goods. Bond testified in substance that he was advised by his attorney to require defendant to pay for the goods already shipped before plaintiffs shipped any more goods; that he made the proposition to Dodge that plaintiffs would ship the goods, mentioned in a list dated May 16, 1912, and valued at $1,923.20, provided defendant would pay for the same in advance; and that to a certain extent plaintiffs were afraid of the credit of defendant and that that was the reason why plaintiffs did not ship said goods. This offer to ship said goods provided defendant would pay for the same in advance cannot be considered as an unqualified tender, and it was not in accordance with the terms of the contract contained in said letter of January 13, 1912. By that contract plaintiffs agreed that they would complete the manufacture and delivery of the goods as quickly as possible, and that said goods should be paid for by defendant "in thirty days from delivery." In Lonsen v. Stroneil, 41 Ill. 101, 104, it is said: "In the case of Hungate v. Rankin, 20 Ill. 639, it was said that plaintiff could not recover unless he had performed his part of the contract, or was ready and willing to perform within the time limited by the agreement. * * This is believed to be the uniform rule, and we regard it

as the settled law of this court." (See, also, Ramsey v. Window, 71 Ill. 214, 220; Burnham v. Roberts, 70 Ill. 19, 24.) In our opinion, the evidence does not disclose such a state of facts as excused plaintiffs from tendering to defendant the goods for which plaintiffs claimed the sum of $2,076, and plaintiffs are not entitled in this action to recover therefor; neither are plaintiffs entitled to recover the moneys expended in storing and insuring said goods.

Our conclusion is that under the evidence plaintiffs are entitled to recover of the defendant only the said sum of $1,535.25, less the total payments of $600, together with interest at the legal rate. Computing interest on said sum of $1,535.25 from April 6, 1912, up to time of the first payment of $200 on May 23, 1912, and crediting defendant with that payment and with the other two payments made shortly thereafter of $200 each, and computing interest on the balance, $935.25, up to the date of the judgment, June 5, 1914, said interest amounts to $105.22, which added to said balance of $935.25 makes the total sum of $1,040.47. The judgment entered was $2,428.83. If plaintiffs will here file a remititur within ten days in the sum of $1,388.36, the judgment will be affirmed in the sum of $1,040.47, otherwise the same will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

70 - 21036

CITY OF CHICAGO, Defendant in Error, vs. WILLIAM WRIGHT, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO

195 I.A. 578

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 19, 1914, Alvena Freylich filed her complaint in the Municipal Court of Chicago in which she alleged that "William Wright, * * on or about the 18th day of August, 1914, at the City of Chicago aforesaid, and at divers other times prior thereto, committed an indecent, lewd and filthy act, and did utter lewd, indecent and filthy words publicly and in the hearing of other persons, and did make obscene gestures publicly, to and about the affiant, in violation of section 2026 of the Revised Municipal Code of Chicago." The defendant was arrested and gave bail and subsequently waived a trial by jury. A trial by the court was had on October 9, 1914. The court found him guilty of a violation of the ordinance described in the complaint and assessed a fine of $25 against him, upon which finding judgment was entered.

The evidence against the defendant was weak and unsatisfactory, and, as we have reached the conclusion that the judgment must be reversed and the cause remanded for a new trial on account of errors in the admission of evidence, we shall not discuss the testimony. The court permitted certain witnesses for the City other than the complaining witness, both in chief and in rebuttal, to testify that at divers times defendant had used certain alleged indecent language to them, privately and not in the presence of the complaining witness, which rulings we think were prejudicial to the defendant.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

74 - 21044

MARIA PETERS,
Defendant in Error,

vs.

JOHN A. REDDY and FANNY REDDY,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 579

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 4, 1913, Maria Peters commenced a fourth class action in contract in the Municipal Court of Chicago against John A. Reddy and Fanny Reddy, defendants. Plaintiff alleged in her statement of claim in substance that she had been the owner of premises known as 733 Dearborn avenue, Chicago; that on or about August 5, 1911, she sold and conveyed her equity in the same to the defendants for the sum of $5,500, receiving from them $5,300, thus leaving a balance due of $200; that as evidence of said indebtedness the defendants executed and delivered to her the following instrument in writing, duly signed by each of them:

"$200. Chicago, August 5, 1911.

When convenient after date we promise to pay to the order of Peter Peters two hundred dollars, payable at Chicago, Illinois.
Value received with interest at no % per annum.

John A. Reddy
Mrs. Fanny Reddy."

and that said sum of $200 is due and owing her from the defendants on account stated, together with interest at the rate of 5 per cent. per annum. Both defendants entered their appearance and demanded a jury trial and subsequently, by an authorized agent, filed an affidavit of merits in which it was alleged that it was not true that defendants paid

plaintiff the sum of $5,300 and executed a note for $200 as balance of the purchase price, but that defendants paid plaintiff the sum of $5,500 for said property, as provided by an agreement between plaintiff and defendants, and said note did not form part of said payment; and that said note was made by defendants without any consideration therefor. It will be noticed that defendants in their affidavit of defense did not deny that at the time of the sale of said premises plaintiff, individually, was the owner thereof, or that she sold the same to both defendants at the price alleged, or that defendants' liability as evidenced by said instrument in writing had not matured, or that it was not convenient for defendants to discharge said liability, or that the liability was to Peter Peters and not to plaintiff, or that said instrument in writing was not delivered to plaintiff. The defense was that the defendants had paid plaintiff the full amount for the property as agreed, viz, $5,500, that the said "note" did not form part of said payment and that the same was given without any consideration therefor.

The cause came on for trial on September 21, 1914, at which time the defendants waived a trial by jury and the case was submitted to the court. At the conclusion of the evidence the court found the issues against the defendants and assessed plaintiff's damages at the sum of $200, upon which finding judgment for $200 against both defendants was entered.

Plaintiff sought a recovery by virtue of the original promise of the defendants to pay $5,500 for the property, of which she had only received $5,300, leaving an indebtedness of $200. Said instrument in writing was introduced as evidence of that indebtedness. Plaintiff, at the time of the transaction, was about 80 years of age. De-

fendants had been tenants of plaintiff for about 19 years and their relations had been friendly. During all this time they had dealt with each other without the passing of receipts. At the time the property was sold to the defendants for the agreed price of $5,500, plaintiff owed the defendant John A. Reddy the sum of $245 for money previously loaned, and there was an unmatured first mortgage on the property of $4,000. It was agreed that said $245 was to be credited to defendants as so much cash to be applied on the amount of cash paid down, that the defendants were to be charged for the proportionate amount of the premium of the unexpired insurance, and that plaintiff was to be charged for the accrued interest on the mortgage, which mortgage defendants were to assume. Plaintiff's testimony was to the effect that when the papers were passed she received in cash the sum of about $5,300, treating said amount of $245 which she owed Reddy as so much cash and adjusting said amounts for unexpired insurance and accrued interest; that the instrument in writing was given as evidence of a balance still due her from the defendants of $200; that after the transaction was consummated she noticed that the same was payable to her husband, and that she several times applied to Reddy to change the same, but that he kept putting her off, saying, however, that he would make payment only to her. Defendants' witness, Wandel, testified that he was present when the deal was closed, that the instrument in writing for $200 was simply a memorandum of indebtedness and that "it was the intention of everybody that that $200 should be paid." The defendant John A. Reddy testified, in substance, that he did not receive any consideration for the note, that it did not represent part of the purchase price and that he "gave the note for a present." He stated, however, on cross-

examination that "I had a talk with Mrs. Peters to the effect that I would pay it when the other obligations were paid, and that is the reason I made it payable 'when convenient'; the mortgage was due April 27th, last year."

Counsel for defendants have assigned as error that the finding and judgment are against the evidence. Under the issues formed we are of the opinion that the trial court was fully warranted in making the finding and entering the judgment. We deem it unnecessary to discuss the other legal points urged by counsel as they do not appear to us to be pertinent to the case as disclosed. The judgment is affirmed.

AFFIRMED.

97 - 21071

CHARLES L. WOOD,
Plaintiff in Error,

vs.

MINNIE N. FOSTER,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

195 I.A. 580

MR. PRESIDING JUSTICE SHELDON DELIVERED THE OPINION OF THE COURT.

This case has been tried twice. On the first trial the court directed the jury to return a verdict in favor of the defendant, Minnie N. Foster, which they did, and judgment was entered on the verdict against the plaintiff. On June 24, 1913, this court reversed said judgment and remanded the cause on the ground that the trial court erred in directing a verdict for the defendant. (Wood v. Foster, 181 Ill. App. 409.) When the case came on for trial the second time the defendant withdrew her request for a jury trial, and the case was tried before the court upon the same evidence as was introduced at the first trial. It was stipulated that the transcript of the record and the printed abstract thereof filed in this court on the former appeal be introduced in evidence without objections or exceptions by either party. The court found the issues against the plaintiff and on October 2, 1914, entered judgment against the plaintiff for costs. The issues made by the pleadings and the evidence in the case are sufficiently stated in the former opinion of this court and need not here be repeated.

The main contention of counsel for plaintiff is that the finding and judgment are manifestly against the weight of the evidence. After a careful examination of the transcript before us we cannot say that such is the case.

The plaintiff requested the trial court to hold certain "propositions of law and fact." They were seven in number. The court marked the 4th, 6th and 7th propositions refused. Counsel for plaintiff contends that the court erred in refusing said propositions. We think the 7th proposition was properly refused. The 4th and 6th propositions are neither propositions of law nor propositions of fact but are mixed propositions of law and fact, and were properly refused. (Breadhan v. Bruce, 177 Ill. App. 183, 184; Knox Engineering Co. v. Rock Island, etc., Ry. Co., 264 Ill. 198, 200.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

114 - 21088.

CITY OF CHICAGO,
Defendant in Error,

vs.

JOHN DOE, alias Dave Smith,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

195 I.A. 582

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The amended complaint of F. J. Hoffman, signed, sworn to and filed on October 22, 1914, alleged that John Doe, alias Dave Smith, on September 19, 1914, at the city of Chicago, "was then and there the keeper of a certain common, ill-governed and disorderly house, then and there kept for the encouragement of idleness, gaming, drinking, fornication, and other misbehavior, then and there located at 315 N. La Salle St., in the city of Chicago, in violation of section 2019 of the Revised Municipal Code of Chicago." Prior to the trial the defendant moved to quash and strike said complaint from the files, which motion was denied. The jury returned a verdict finding the defendant "guilty of a violation of the ordinance, described in the complaint he sin, known as section 2019," and assessing a fine against him of $200. After overruling motions for a new trial and in arrest of judgment, the court entered judgment upon the verdict against defendant for $200 and costs, which judgment the defendant by this writ seeks to reverse.

While it does not appear from the transcript that said section 2019 was formally introduced in evidence before the jury, it does appear that the court in the oral charge to

the jury stated that "the ordinance under which the City is proceeding in this case reads as follows: 'Every common, ill-governed or disorderly house, room or other premises, kept for the encouragement of idleness, gaming, drinking, fornication or other misbehavior, is hereby declared to be a public nuisance, and the keeper and all persons connected with the maintenance thereof, and all persons patronizing or frequenting the same, shall be fined not exceeding two hundred dollars for each offense.'"

We cannot agree with the contention of counsel for the defendant that the judgment should be reversed because it does not appear that the ordinance upon which the complaint was founded was formally introduced in evidence before the jury. The Municipal Court of Chicago is required by section 54 of the Municipal Court Act to take judicial notice of all general ordinances of the City. It is to be presumed that the trial court took judicial notice of the provisions of section 2019 of these ordinances. (City of Chicago v. Tearney, 137 Ill. App. 441; City of Chicago v. Moran, 192 Ill. App. 57.) Apparently the jury were told by the oral charge what the provisions of said section were, and we think it is also to be presumed that the court correctly stated the provisions of said section of the general ordinances of the City in force at the date mentioned in the complaint.

And we are of the opinion that the court did not err in denying defendant's motion to quash the complaint. (City of Chicago v. Williams, 254 Ill. 360, 363.)

And we think there was sufficient evidence to show that the defendant was a keeper of such a disorderly house at

515 N. La Salle street as is charged in the complaint, and to warrant the verdict of the jury, and that such verdict is not against the weight of the evidence.

It is also urged that there is error, prejudicial to the defendant, in certain portions of the court's oral charge to the jury. We have read the charge as it appears in the transcript and are of the opinion that when the same is considered in its entirety the defendant was not prejudiced, and that the jury were fairly instructed.

Finding no reversible error in the record the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Filed Dec. 21, 1915

131 - 21105.

M. GOLDSTEIN, Defendant in Error,	Error to Municipal Court of Chicago.
vs.	
PAUL SEYKA and ANNA [illegible], Plaintiff in Error.	

MR. PRESIDING JUSTICE GREBLEY DELIVERED THE OPINION OF THE COURT.

The plaintiff [illegible], on October [illegible], 1915, filed his statement of claim [illegible] real estate broker. The defendants [illegible] their [illegible] and demanded a jury trial. Subsequently [illegible] statement of [illegible] that his claim was for commissions due him as a [illegible] real estate broker for procuring at defendant's [illegible] purchaser, [illegible] Cliff, [illegible] certain real [illegible] ments thereon owned by [illegible] of Chicago; that the [illegible] said Cliff on June 23, 1913, for the sum of $16,[illegible] the amount due plaintiff as [illegible] or $337.50. The defendants in [illegible] alleged in substance that they did [illegible] broker or otherwise with reference to said [illegible] plaintiff did not act as agent for [illegible] said Cliff in the transaction. The jury [illegible] finding the issues against the defendants and [illegible] plaintiffs damages at $337.50, upon which verdict the [illegible] the judgment here sought to be reversed.

The evidence shows that plaintiff was a duly licensed real estate broker, that defendants owned the property and that plaintiff carried on negotiations with Cliff with the knowledge of defendants which resulted in the sale.

It is contended that as the evidence fails to show that defendants formally employed plaintiff to negotiate the sale and as there is evidence showing that plaintiff was employed by the purchaser, the verdict and judgment cannot be sustained. We think there is ample evidence to warrant the verdict and judgment. It appears that as a result of the efforts and negotiations of plaintiff the parties were brought together and signed a written contract whereby defendants agreed to sell, and Cliff to buy, the property for [illegible],000; that subsequently further negotiations were had which resulted in the price being reduced to $18,500; that there was no special agreement between plaintiff and defendants as to the commissions to be received by plaintiff, but that these commissions were usually 2½% on the purchase price. We think the evidence is such that the employment of plaintiff by defendants to negotiate a sale of the property may be implied, and that while it appears that plaintiff was also acting as an agent for the purchaser the evidence discloses that defendants knew of that fact, and that no fraud was practiced upon defendants by plaintiff. "When a broker has presented to his principal a purchaser whom the principal is willing to and does accept, and they enter into a contract of sale, the broker's commissions are earned." ([illegible], [illegible], [illegible] Cal. 331, 337.)

The judgment of the Municipal Court is affirmed.

571 - 20906

JOHN F. WALLACH et al., Appellants,	
vs.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
C. C. K. BILLINGS et al., on appeal of PAULINE CHUN et al., Execrs.,	
vs.	
CHICAGO NATIONAL BANK et al., Appellees.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Separate appeals were allowed and taken from the decree herein, but all raise the same question, that of the sufficiency of the bill on general demurrer. As we have considered the question in another appeal, (No. 20733), and filed an opinion affirming the decree, the reasons therefor need not be restated. The order in that case will necessarily dispose of this.

AFFIRMED.

546 - 20879

ALBERT NACHOLZ,
Appellant,

vs.

HOMEWOOD PRESS, a corp.,
et al., etc.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

195 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This action was brought by Nacholz, as plaintiff, against appellees to recover damages for personal injuries received while working for the Homewood Press at one of several boxes on a platform where they had been unloaded from a wagon. The charges mainly relied on were (1) that a wagon belonging to the defendant Cotter was negligently backed up to the platform against one of the boxes causing one to fall on plaintiff and injure him, and (2) that his foreman had ordered him to assist in removing the boxes against his protest that there was danger under the circumstances in so doing. The verdict was for defendants.

Two points only are argued in appellant's brief, (1) that there was error in improper cross-examination, and (2) that the verdict was against the preponderance of the evidence. It is enough to say as to the former that inasmuch as the objection to the cross-examination was a general one and not on the specific ground that it was not proper cross-examination, the point urged was not preserved for review, (Brisley & Co. v. Burke, 255 Ill. 356; Ill. Cent. R. R. Co. v. Brickett, 210 Id. 140) and as to the latter point that there was evidence upon which the jury was warranted in finding that the plaintiff was guilty of contributory negligence, which was one of the issues of fact. Being

unable to say that the verdict was manifestly against the preponderance of the evidence on that issue, we should not disturb it. This conclusion renders a review or comment upon the evidence at length unnecessary and conducive to no useful purpose.

AFFIRMED.

622 - 20960

HUGO MUNZER et al.,
Appellees,

vs.

KATHRYN HILLABRANT,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

1951 I.A. 637

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure of a trust deed. Appellant contended that the money borrowed and secured by the trust deed included a commission from the lender and thereby made the contract usurious, and that the finding of fact to the contrary by the master in chancery and in the decree is contrary to the evidence.

We have carefully examined the record and find no occasion to disturb that finding. Appellant applied for the loan to a real estate agent in Chicago and authorized a commission to be paid therefor. The latter applied to a second party and he in turn to a third who obtained the money from a fourth party and received part of the commission. We see no reason to question the finding of fact upon which there was positive evidence, against which were mere circumstantial facts not inconsistent with the affirmative proof, that the loan actually came from the fourth party, who received no commission, and not, as contended, from the third party who received part of it. The evidence supports appellees' contention that the intermediate parties were acting as agents for appellant and not for the lender. The decree will be affirmed.

AFFIRMED.

627 - 20965

SAMANTHA F. WILLIAMS, Appellee,	APPEAL FROM
vs.	SUPERIOR COURT,
THE J. F. ROWLEY COMPANY, Appellant.	COOK COUNTY.

195 I.A. 638

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On a hearing before the court without a jury, appellee, the plaintiff, obtained judgment for $100 in a suit brought against appellant, the defendant, averring in some of the counts rescission of a contract for the sale of an artificial leg and in others a breach of warranty. The contention is made, in which we concur, that the evidence does not support either theory.

Plaintiff, a non-resident of Chicago, was first approached on the subject of purchasing the leg by an agent of defendant, and relied upon an alleged verbal warranty by him. But it is not only apparent from subsequent correspondence between her and defendant as to the terms of the contract that no contract had then been entered into, but that a written contract signed by defendant, embodying terms and conditions, was subsequently delivered to and manifestly accepted by her. In view of that fact, the court properly, at the close of the case, struck out the evidence relating to the verbal contract upon which her claim of warranty was based. The written contract contained covenants to make certain repairs and to do other specified things not involved in this action, but contained no covenants of warranty. There was, therefore, nothing in the contract upon which to base an action for a breach of warranty, and if there had been,

there was no basis in the evidence upon which any damages for a breach of warranty could be ascertained or assessed, there being no evidence of the actual value of the leg furnished. (Woodford Distilling Co. v. Remington Typewriter Co., 174 Ill. App. 244).

Nor is there any basis in the evidence to support the theory of a rescission of the contract. It appears therefrom that plaintiff came to defendant's factory in Chicago where the leg was fitted; that she then paid the balance of the purchase price therefor, according to the terms of said written agreement, which she then received, and left the leg to be finished and forwarded to her at Coldwater, Michigan, where the same was sent in a few days; that she has retained possession of it ever since, and that two years afterward she came into the factory wearing the leg for the purpose of having some repairs made upon it, and wore it when she left. While she denied that she had used it in the meantime, except for the purpose of testing it, two witnesses testified that it bore evidence of use and wear. She admitted that she tried to use it, but claimed that it did not fit her and that she asked to have her money back, though she never returned or apparently offered to return the leg. Her action under the circumstances, even as testified to by her, cannot be deemed otherwise than an acceptance of the leg. As stated in Golf Co. v. Monarch Refrigerator Co., 252 Ill. 491, if it conformed to the contract she was bound to accept it, and if it did not substantially conform to the contract, she had the right to accept or reject it, and if she chose to retain and use it, she thereby accepted the ownership of it. We think the evidence shows that she was using the leg two years after she purchased it and came into defendant's office to have it

repaired and by such action and by her previous retention and use of it she waived the right to return the leg and elected to accept it.

Plaintiff should have been required to elect which cause of action she relied upon. The two remedies were inconsistent. She could not bring a suit for damages for a breach of warranty without affirming the sale which, of course, is inconsisent with a rescission of contract or disaffirmance of the sale. (Woodford Distilling Co. v. Remington Typewriter Co., supra). But, as before stated, there was no basis in the evidence for the former, and we think it is conclusively against the theory of the latter. We shall, therefore, enter such a judgment here as should have been entered by the court below.

[illegible].

FINDING OF FACT.

We find that the appellant, the J. M. Howley Company, was not guilty of a breach of warranty, and that there was no rescission by the appellee, Samantha F. Williams, of the contract of sale upon which the action was based.

109 - 21083

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. JOHN H. MONTGOMERY, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

195 I.A. 640

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, Montgomery, was convicted on an information charging him with selling cocaine to one Clay contrary to the statute, and was sentenced to three months in the county jail and to pay a fine of $1000 and costs. It is urged that the court should have granted a new trial because the verdict was contrary to the evidence.

There was no direct evidence of a sale and the circumstances relied upon comport with innocence as well as guilt. On the occasion in question Clay was handed five dollars by a police officer manifestly for the purpose of purchasing cocaine from Montgomery, and it appeared that when he entered the store Montgomery was engaged in putting up a prescription for a doctor and his patient; that in their presence he handed Montgomery the money and five dollars additional of his own, asking him to keep it for him, and, saying nothing else, stepped behind the counter, took a bottle of cocaine worth about two dollars, and walked behind a screen where there was a water closet. There was no evidence that Montgomery or any of the bystanders, who testified for Montgomery, saw Clay take the bottle or knew that he did; nor evidence tending to establish a secret understanding between him and Montgomery. Clay, though called for the prosecution, was not even interrogated as

to such an understanding and Montgomery expressly denied that one existed. While violators of the statute in question would doubtless resort to clandestine methods and subterfuges in effecting unlawful sales, so that considerable weight would attach to circumstances tending to establish them, yet unless there was sufficient evidence to show an understanding between Montgomery and Clay that when others were present the latter was to help himself to cocaine and resort to some such subterfuge in paying for it, there was no evidence of a sale. While there was evidence that raised a strong suspicion that the request to keep money for him might have been a ruse, yet alone it was insufficient to warrant conviction, as all the circumstances with which it was connected were equally consistent with innocence. Clay was formerly a porter at Montgomery's store. It was not unusual for him to ask his former employer to keep money for him. He might in view of his apparent familiarity with his former employer and the place have gone behind the counter for innocent purposes. He remained in the store some twenty minutes apparently without exciting the suspicion or engaging the attention of any one in the store as to what he did when he went behind the counter. Montgomery returned the money when requested. Had there been affirmative evidence to warrant a reasonable inference that an understanding existed between Clay and the accused, we would not disturb the verdict, but otherwise we think the evidence was insufficient to sustain the verdict and a new trial should have been granted.

REVERSED AND REMANDED.

417 - 21195

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

v.

S. ROBINSON,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

1951.A.641

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

Plaintiff in error was convicted upon an information attempting to charge the obtaining of money by false pretenses. Contending that it was insufficient to support a conviction, he moved to vacate the judgment because the information fails (1) to state that defendant made any representations whatever, (2) to set forth what representations were made, (3) to aver the defendant knew they were false, and (4) to aver that the person defrauded relied on them or believed them to be true. It is contended in behalf of the People that the information states the offense in the terms and language of the statute creating it, or so plainly that the nature of it may be easily understood by the jury, and, therefore, is sufficient under Sec. 6, Div. 11 of the Criminal Code.

Except as to mere formal parts of the information, it charges that plaintiff in error "did unlawfully and fraudulently with intent to cheat and defraud by certain false representations or pretences, obtain from Gus Schreiber the sum of One Hundred Dollars ($100) lawful money," etc. From this language it is apparent that there is no express averment of any of the things alleged to be omitted. All of them are deemed essential elements of the offense (see

Vol. 19 Cyc. 393 and authorities cited) and unless they are expressly averred or included in or necessarily implied from other averments in the information, it must be deemed fatally defective.

The crime is one created by statute modeled on the English statutes relating to the same subject, and the decisions are quite uniform as to what constitutes its essential elements, which need not here be stated. It, therefore, remains to be considered whether the averments of the information are sufficient in the light of the provision of our Criminal Code above cited.

After a careful examination of the several decisions in this state, giving construction and application to said provision, we find none that is particularly helpful in the instant case, and none in which the indictment or information charging said offense did not expressly aver that the defendant made false representations or "falsely pretended," and state what the representations or acts were. If we may assume that an information or indictment is sufficient under the statute without these averments (which we do not undertake to hold) yet it will be observed that the information does not use all the essential words of the statute. It omits the word "designedly" and employs no equivalent thereof. Scienter or knowledge of the falsity of the representation or pretense is an essential ingredient of the offense, held by some authorities to be covered by the word "designedly." It was held in Commonwealth v. Hulbert, 12 Metc. (Mass.) 446, that the words "designedly and unlawfully did falsely pretend," described the offense in the words of the statute and were sufficient without the use of the word knowingly; and in State v. Halida, 78 West Va. 499, where the indictment for obtaining property by

false pretenses used the word "knowingly" instead of the statutory word "designedly" that it was sufficient to import scienter; and in State v. Snyder, 66 Ind. 379, that the words "designedly, etc., did falsely pretend," implied that the defendant knowingly did falsely pretend, and that the words "designedly intended to defraud," etc., included the charge of knowingly intending to defraud, and, therefore, clearly import a scienter on the part of defendant. There are, however, authorities to the contrary. (See State v. Bradley, 58 Iowa. 140; State v. Blauvelt, 44 N. J. L. 390.) But in the instant case, not only does the information not use the statutory word "designedly" but it contains no equivalent word or words that import scienter or knowledge of the falsity of the representation. The words "unlawfully and fraudulently" cannot be deemed synonymous or equivalent. It was held in Regina v. Henderson, 2 Moody C. C. 269, that these words do not import scienter and are not equivalent to "knowingly." It was held in State v. Ballis, 37 Tex. 443, and Jones v. State, 17 Tex. App. 118, where indictments were based on statutes using the word "knowingly" that the word "unlawfully" was not equivalent thereto. With a consideration of the several objections to the information, it must be held that in support of its failure to allege defendant's knowledge of the falsity of the representations it is insufficient and not in the terms and language of the statute or so plain that its nature may be easily understood by a jury; and the defects are not such as would be cured by verdict or finding of court; hence the judgment must be reversed and the cause remanded.

[illegible].

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